

Fall 8-1-1967

The Doctrine of Equality of States and the New Nations

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Moeser, John Victor (M.A., Political Science)

The Doctrine of Equality of States and the New Nations

Thesis directed by Professor George A. Coddington, Jr.

The only way in which international law can command respect and obedience among its intended adherents is by

merging its basic principles with political and social reality. Otherwise, it becomes little more than a collection of idealistic norms unrelated to the observable facts and the operative forces in the relations of states.

In an attempt to indicate the results of separating law from reality, this paper analyzes one principle of international law, the doctrine of equality of states. The doctrine is traced from its origin in naturalism, to eighteenth and nineteenth century voluntaristic positivism and, finally, to a non-theoretical application made by the new nations in the United Nations system. This is done by examining the relation between positivism as applied by the naturalists, positivists, and the new nations, a theoretical structure designated as a sociological perspective of international law is constructed. By analyzing each application of the doctrine in light of this sociological perspective, this paper attempts to indicate the evolution of the doctrine from a state of idealism, as represented by the naturalist deduction of legal norms from divine revelation, and from a state of

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liertness, as represented by the positivist derivation of norms from the sovereign will of the state, to a semblance of realism, as represented by the new nations and their emphasis on deriving pragmatic means to obtainable ends.

CHAPTER

INTRODUCTION.

This abstract is approved as to form and content.

I recommend its publication.

II. THE DOCTRINE OF NATURAL EQUALITY OF STATES.

Signed George A. Codding 1.
Instructor in charge of dissertation

IV. THE NEW NATIONS AND THE DOCTRINE. 80

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For any legal system to have validity, it must reflect the political and social realities of a changing

world; otherwise, the system becomes static, producing compliance to its standards by appealing solely to reason and/or morality, and creates schisms between the theoretical structure and the social reality of the operative international relations of states.

Following the First World War, political scientists began to take a more active role in the study of temporary international affairs. Immediately, they noted their dissatisfaction with the existing juristic worlds and the conduct of governments. While they did not expect exact or invariable conformity to law, they began to question the value of law presented simply as a collection of forms with little compulsion to the with little bearing on the decisions made by states with latitude for a wide range of interpretation.

was then propounded as law offered no explanation of the action of governments and provided no aid to comprehension nor a measure of expectation by which to guide policy.² Hence, the study of international law tended

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¹For an excellent discussion on the role of men like Leon Duguit and Max Huber in the evolution of international law during the interwar period, see: Charles De Visscher, Theory and Reality in Public International Law (Princeton: Princeton University Press, 1977), pp. 1-7.

²Percy Elwood Corbett, The Study of International

INTRODUCTION

For any legal system to have validity, it must reflect the political and social realities of a changing world; otherwise, the system becomes static, produces compliance to its standards by appealing solely to reason and/or morality, and creates schisms between the theoretical structure and the observable facts and the operative forces in the relations of states.

Following the First World War, political scientists began to take a more active role in the analysis of contemporary international affairs.¹ Immediately, they noted there was little relation between the juristic worlds and the conduct of governments. While they did not expect exact or invariable conformity to law, they began to question the value of law presented simply as a collection of norms with little compulsion behind them, with little bearing on the decisions of statesmen, and with latitude for a wide range of interpretation. What was then propounded as law offered no explanation of the action of governments and provided no aid to comprehension nor a measure of expectation by which to guide policy.² Hence, the study of international law tended

¹For an excellent discussion on the role of men like Leon Duguit and Max Huber in the evolution of international law during the interwar period, see: Charles De Visscher, Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957), pp. 61-67.

²Percy Elwood Corbett, The Study of International

to suffer from lack of realism.

Reacting to this meaningless, laborious perusal of international law and believing that legal systems are viable in proportion to their relation to power and the decision-making process, some political scientists, such as Percy E. Corbett, Charles De Visscher, Wolfgang G. Friedmann, Morton A. Kaplan and Nicholas deB. Katzenbach, merged their study of law with a sociological analysis of world affairs.³ Law began to be observed, not as a static, inflexible rule of conduct which governed all men and nations from ideas of abstract right, but as a constantly evolving process which grows in relation to the evolution of social and political norms. This conception of international law served as a catalyst in the reconciliation between legal norms and existing realities and provided a rationale for the development of law and the adherence to that law by power conscious nations.

By utilizing the basic approach to international

Law (New York: Doubleday & Company, Inc., 1955), pp. 1 and 47.

³See Percy E. Corbett, The Study of International Law (New York: Doubleday and Co., Inc., 1955); Charles De Visscher, Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957); Wolfgang G. Friedmann, The Changing Structure of International Law (New York: Columbia University Press, 1964); Morton A. Kaplan and Nicholas deB. Katzenbach, The Political Foundations of International Law (New York: John Wiley and Sons, Inc., 1961).

law of these publicists, Chapter I constructs a theoretical structure, designed as a sociological perspective of international law, that serves as a means by which to evaluate the effectiveness of one aspect of international law, the doctrine of equality of states. Like the whole of international law, the doctrine of state equality has been in a state of flux, evolving from a legal system conceived either from a naturalist deduction of particular rules from right reason and divine revelation, the concern of Chapter II, to a positivist derivation of norms from the sovereign will of the state, the concern of Chapter III. Both levels of doctrinal development, at least from a sociological perspective of international law, tended to remain aloof to political and social reality thereby producing a doctrine of state equality consisting solely of formal, static rules. For one thing, both the doctrine of natural equality and the doctrine of legal equality were products of the philosophical traditions of Western colonial powers with little relevance for the dependent peoples.

Thus, the primary objective of Chapter IV is to indicate a third level of development for the doctrine, produced largely by the heavy influx of new nations during the twentieth century. Rather than deriving a new theoretical basis for the doctrine, the new nations took the general idea of the Western inspired doctrine and directly and indirectly invoked it as a rationale

for their attempts to gain greater equality with the West. These efforts were manifested both in and out of international organization, although this chapter limits its investigation to international organizations, particularly the United Nations. By selecting such areas within the United Nations system as the General Assembly, the Security Council, the Economic and Social Council, the financial agencies and by focusing on the new nations' efforts to establish a Special United Nations Fund for Economic Development and a United Nations Conference on Trade and Development, this paper attempts to show the positive and negative results of the new nations' demands for equality. To analyze the contributions made by the new nations to the overall development of the doctrine, their efforts in the United Nations are then evaluated in light of a sociological perspective in Chapter V.

It should be noted that no attempt is made to justify the theoretical conception underlying this paper as the ultimate method by which to judge the validity of the doctrine of state equality, or anything. Admittedly, this paper's theoretical structure is broad. It simply assimilates general trends within recent studies made on the theory of law. Regardless of the comprehensivity, or lack of it, of conceptual structures, no single approach offers theoretical or methodological absolutes. As Dag Hammarskjöld said:

CHAPTER I

THE BASIC TENETS OF A SOCIOLOGICAL PERSPECTIVE OF INTERNATIONAL LAW

This chapter presents the basic tenets of a sociological approach to international law. First, this approach is a reaction to the ineffectiveness of the naturalist interpretation of law which conceived law as a process of deducing particular rules from "right reason" or divine revelation. The naturalists, consisting in the Middles Ages of an elite group of theorists representing the church, the monarchy, and the aristocracy, and in the Enlightenment of writers like Samuel Pufendorf, placed law on a moral plateau far removed from the realities of the world. Consequently, law tended to become a sterile code of ethics rather than a reflector of actualities.¹

Second, a sociological approach is a reaction to the inabilities of a positivist interpretation of law to grapple with social and political factors in the formulation of law. The positivist approach, while offering

¹For an excellent discussion of the naturalist interpretation of international law and of additional theorists who, like Pufendorf, believed that natural law was secular in origin, see: J. L. Brierly, The Law of Nations Sir Humphry Waldo, ed. (6th ed.; New York: Oxford Univ. Press, 1963), pp. 16-25; Morton A. Kaplan and Nicholas deB. Katzenbach, The Political Foundations of International Law (New York: John Wiley and Sons, Inc., 1961), pp. 52-62; and William D. Coplin, The Functions of International Law (Chicago: Rand McNally and Co., 1966), pp. 15-16.

numerous technical theories on the formulation of law, tends to become static by its emphasis on the formal procedures of elaboration, its fixation on the importance of state wills, and its stress on only the last phase by which norms are formed, the legislative process, as opposed to the political and social influences which are the foundation and ultimate explanation of law.² While

²The Positivist School of law includes several strains of thought and while these various strains of positivism all share common characteristics, such as the emphasis on consent and utility, they do have certain differences on which an advocate of a sociological perspective of international law needs to be aware. William D. Coplin, The Functions of International Law (Chicago: Rand McNally and Co., 1966), p. 16. Voluntaristic positivism, which attained its full rigor and narrowness during the nineteenth century "when the movement of nationalities had multiplied tenfold the power and exclusiveness of sovereign states" stresses the science of law at the sacrifice of ethical and social bases of international law. When speaking of positivism, or particularly legal equality as seen in Chapter II, this paper refers primarily to voluntaristic positivism. The positivism of Leon Duguit had its hour of fame after the First World War. It based the rule of law upon men's direct perception of social necessities and the implementation of this rule by the state. While attempting to use realism by the merger of fact and norms, he exposed a lack of solidarity interpreted in fact by the holders of power. Such theories lead to sacrificing human values to the state. For Hans Kelsen's pure theory of law, the positivity of norms depends solely on their quality of being logically reducible to one fundamental norm (Grundnorm), the ultimate source of the legal order. Such conceptions limit arbitrarily, on the pretext of science, the subject matter of law, narrowing legal reality. Charles De Visscher, The Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957), pp. 51-52; 61-67. Also, see Kaplan, op. cit., pp. 62-70.

the naturalist analysis of law relegated law to an irrelevant system of ethics, the positivist approach analyzed law as an autonomous unit separate and apparent from ethics.

Presently, a sociological approach to international law offers, at best, a few aids by which to analyze the effectiveness of law without attempting to devise new theories. According to Morton Kaplan, "We are living with a number of makeshift experiments that do not fit into the old theory, but neither do they allow us with confidence to propose a new theory."³ This chapter does not attempt to construct new theories but only to present the following three factors, gleaned from several writers in the field of international law, which compose a means to evaluate the effectiveness of international law:

(1) the integration of legal norms with political and social realities (2) the conception of law as an evolving process rather than a body of formal static rules, and (3) the reorientation of law into a system of ethics through a combination of legal processes and political and social realism.

The first premise involved in a sociological approach to international law is the necessity of integrating legal norms with political and social realities. Without

³Kaplan, op. cit., p. 76.

such integration, legal norms are either subject to a naturalist appeal to irrelevant maxims derived from man's fluctuating intuition or they are severed from their deepest roots for the sole purpose of integrating them in a scientific but purely formal system. Charles De Visscher noted the traditional estrangement of law and reality when he said:

Entrenched in its formal positions, doctrine long evaded direct confrontation of international law with politics. At times it simply ignored the political, at others it attempted to eliminate it by artificially bringing even its most elementary data under legal criteria. The defects of such methods become increasingly marked as the profound upheavals in the life of the peoples forced the man of law to grasp realities more firmly.⁴

A legal principle becomes effective in proportion to its alliance with reality; otherwise, the principle, and the rules composing it, remain aloof to the practice of centuries.⁵ Insofar as a rule of international law satisfies the requirement of social conformity, it retains its full force in application. The importance of this criterion is well illustrated in treaty regulation. A normative or law-making treaty with a content too far in advance of development in international relations is

⁴De Visscher, op. cit., p. 70.

⁵Georg Schwarzenberger, The Inductive Approach to International Law (London: Stevens and Sons, 1965), p. 78.

stillborn while a treaty which ceases to be exactly observed in the practice of governments no longer remains valid.⁶

"A realistic study of law must, " according to Morton A. Kaplan and Nicholas deB. Katzenbach, "see law in relation to its institutional support, examining the larger process through which rules are created, applied and administered."⁷ Since there is a difference between the institutions which accomplish this within a domestic system and within the international community, it becomes necessary to analyze law within the framework of its particular political context.

As participants in the political processes of government, we all seek to influence official action so that it accords as nearly as possible with our preferences with the kind of society (local, national global) that we want, and that supports a distribution of values of which we approve. We seek at every level to persuade, cajole, and coerce the officials who set policy, to make them enact rules that will distribute rewards and penalties in accordance with our desires... Order itself may be high on the scale of values - today violence in the international community may mean annihilation - history indicates that other values may be more important to various participants... We are concerned with understanding the norms that are enforced as law within society. Whether these norms accord with a higher or eternal "law" is a different question.⁸

⁶De Visscher, op. cit., p. 133.

⁷Kaplan and Katzenbach, op. cit., p. 6.

⁸Kaplan and Katzenbach, op. cit., pp. 18-19.

For H. B. Jacobini, all law must be viewed as a political phenomenon and international law, specifically, has an even more obvious political orientation than other fields of law. Often it is noted that the sources of international law are custom, principles, treaties, writings, and court decisions, but these sources do not explain why they have power or reality. Regardless of whether valid metaphysical principles underlie a particular rule or whether it emerges from the dictate of a sovereign in the Austinian sense, the crux of the matter is whether there is proper support to sustain the maxim, and if so, how this support is evidenced.⁹

Alejandro Alvarez, referring to the impact of political and social influences on law, said:

National law, especially social legislation, is inspired by or takes into account these factors, but they do not by themselves form this legislation. In international law the said elements incorporate themselves into it, they are what constitutes it; one does not treat then of a legislator who takes them into account. The best proof of my affirmation is that, if these factors are modified, by that circumstance alone the law appears antiquated in

⁹John Austin, an English jurist, believed that all law originates with a sovereign will and that because international law concerned several sovereignties, it deviated from the pattern and was, therefore, a useful sort of "positive morality," not true law. For additional information on juristic schools and the relation of law to political phenomenon, see: H. B. Jacobini, International Law: A Text (Homewood, Illinois: The Dorsey Press, Inc., 1962), pp. 24-28.

the connection or in the matter expressly affected by the change and it is not respected.¹⁰

Once it is recognized that to be effective law cannot transcend its political base, then any reformation of law begins in the realm of politics. Hence, the role of law becomes, according to J. L. Brierly, not a creator of order, but an instrument "to underpin the fabric of order once this has been established."¹¹

The second premise involved in a sociological approach to international law is the necessity of conceiving law as an evolving process rather than a body of formal static rules. If the effectiveness of law rests on its integration with reality, then any change occurring within the political and social milieu will naturally bring corresponding changes in the legal processes. It was the failure of the naturalistic and positivistic approaches to law to adjust to a world in flux that caused legal theoreticians such as Charles De Visscher, Percy E. Corbett, and Wolfgang Gaston Friedmann to

¹⁰ Alexandro Alvarez, Despues de la guerra (Buenos Aires: Imprenta de la Universidad, 1943), p. 288 as quoted in Ibid., p. 29.

¹¹ Additional emphasis on the necessity of integrating legal norms with political and social realities is given by: Percy E. Corbett, The Study of International Law (New York: John Wiley and Sons, Inc., 1961); and Quincy Wright, Contemporary International Law (New York: Random House, 1961).

champion new approaches which would reflect political fluidity.¹² De Visscher believed that only through a realistic appraisal of power and its utilization in the creation of legal norms could law evolve into an effective pattern of behavior. It was the conception of law as an autonomous structure, unrelated to reality by the positivistic approach to international law, that motivated DeVisscher to say:

The fundamental position of positivism, excluding as it did from international law everything that could not be traced to agreements of State wills, impressed a markedly static character upon this law. By reducing the formative factors of the law to such agreements, which would logically have to be removed for every amendment of the law in force, voluntaristic positivism singularly accentuated the propensity of international law to immobility.¹³

According to Corbett, legal institutions serve as indicators of the development of international law. He notes, however, that even a study of legal institutions proves little if it does not glean from the study of man and society the idea "that legal institutions only evolve with a consensus on ends and means that is deeply rooted

¹²Corbett suggests that natural law, rather than remaining static, consisted of a collection of notions which varied from time to time and from one society to another; however, this variance of natural law concerned its application as a means of justification rather than as a reflector of changing political and social environment. (Corbett, op. cit., p. 4.)

¹³De Visscher, op. cit., p. 52.

in the slow and often unconscious processes of legal integration."¹⁴

One of the most recent advocates of a cause and effect relationship in international law is Wolfgang Friedmann. For him, "the changing structure and scope of international relations demands a corresponding adjustment in the structure and scope of international law."¹⁵ He notes that the structure of interstate relations has changed during the past fifty years in five central respects and that law, in order to be more effective, must reflect these changes:

- (1) The small, elite club of Western nations during the last century has expanded during the present century to nations representing different civilizations. (Horizontal changes)
- (2) International relations has shown a greater sensitivity for social and economic matters "to the extent that the matters requiring international regulations are sensitive to differences in political, economic and social philosophy." (Vertical changes)

¹⁴Corbett, op. cit., p. 49.

¹⁵Wolfgang Gaston Friedmann, The Changing Structure of International Law (New York: Columbia University Press, 1964), p. 365.

- (3) Since World War II, there has been a greater concern with international economic development.
- (4) The advent of thermonuclear weapons has caused changes in the minimum conditions of national survival and has made "coexistence between the rival political blocs roughly balanced in destructive power."
- (5) The population explosion and the depletion of the earth's natural resources are a less dramatic, but a more destructive threat to mankind.¹⁶

According to Friedmann, the theory advanced by some writers, notably Hans J. Morgenthau, that "law in general, and especially international law, is primarily a static social force" and "indicates the ideological disguise of a policy of the status quo" may have been an accurate interpretation of the traditional international law of coexistence, but it fails to characterize the developing "co-operative" law of international organization as either an implementation or a spur, in some cases, to the forces and interests in mankind striving toward the application of common objectives.¹⁷

¹⁶Ibid.

¹⁷Ibid., p. 58. Hans J. Morgenthau represents an approach in international relations usually termed "realism" although such realism unduly condemns international law to a position of immobility. See Hans J. Morgenthau, Politics Among Nations (3rd ed. rev., New York: Alfred A.

International law, and especially the law of international organization, while inevitably consolidating and thereby, for a time stabilizing, certain dynamic political and social forces, is today overwhelmingly an agent of progress and evolution.¹⁸

The third premise involved in a sociological approach to international law is the necessity to reorient law into a system of ethics through a combination of legal processes and political and social realism. This third tenet attempts to reconcile the extremes displayed by the naturalists and positivists. While the naturalists conceived law as a pattern of behavior derived from a source which had little relation to reality, the positivists either isolated themselves from legal ethics by concentrating on the formal procedures of deriving law, such as agreements of state wills, or they attempted to revive ethical considerations by placing them "...in the form of captious arguments that seek to legitimize the accomplished fact..."¹⁹ Traditional international ethics was either a system of unobtainable objectives which espoused a doctrine of absolute right or absolute wrong, or it was an inherent part of a national foreign policy which identified a nation's actions with a Divine Will. Neither approach attempted to use realism in the formulation of an ethic which, contrary to a means of

Knopf, 1965), p. 91. See also P.H. Kooijmans, The Doctrine of the Legal Equality of States (Leyden, Netherlands, A.W. Sythoff, 1964), pp. 107-116.

¹⁸Friedmann, op. cit., p. 58.

¹⁹De Visscher, op. cit., p. 52.

justification, sought to obtain achievable ends for the development of international cooperation rather than a primitive society consisting of factions fighting among themselves.

Coupling the conception of international law as an agent of progress with the merger of political realism and ethics, Friedmann suggests that the abolition of national-interest in international relations is not the answer to the challenge posed by the changes in the structure of international society; the challenge does, however, radically affect the dimensions and objectives of national-interest.²⁰

Because the content of 'national interest' is changing according to the circumstances of time and space, it is as consistent at one time with the pursuit of absolute national sovereignty as it is at another time with the organization of a regional union, and effective international order force, or even a world federation. It is, of course, possible to pursue values and ideals of international order, not from the standpoint of national interest but as ethical or political goals antithetic to the interests of a nation, which a particular statesman... may regard as outdated... But it is equally possible to work for the strengthening of international law and authority from the standpoint of 'enlightened national interest' as being the best or even the only way of ensuring national survival.²¹

Reinhold Niebuhr, a theologian who bases his purview of political life on the egoism of men, also has been most vocal on the subject of ethics and realism.

²⁰Friedmann, op. cit., p. 57.

²¹Friedmann, op. cit., p. 48.

He fears a secular humanism which emphasizes the progression of mankind through social engineering because it either lives on illusions of human goodness or it, because of the lack of man's response to strict behavioristic theories, falls into despair. Not wanting to offer absolutist positions on the behavior of man, he has developed a "flexible, contextual ethic," which allows him more room for political maneuvering than does the absolute moralism of many "Christian political theorists."²²

An approach needed by all nations and expressed to a great extent by the new nations is one which insists that processes of law - government cannot accurately be described or analyzed except in their appropriate contextual framework. This approach, termed realism by Morton Kaplan, has the effect of "...broadening the focus of scholarly attention by seeking to clarify

²²Janet Elaine Wolfe, "The Doctrine of Man and Politics in the Thought of Reinhold Niebuhr," (unpublished Master's thesis, Department of Political Science, University of Colorado, 1965), pp. 143-144. For a good example of Niebuhr's contextual ethics, see: Reinhold Niebuhr, Moral Man and Immoral Society (New York: Charles Scribner's Sons, 1932). Additional information on the relationship between realism and ethics can be found in the following: Reinhold Niebuhr, Christian Realism and Political Problems (New York: Charles Scribner's Sons, 1940); Ernest W. LeFever, Ethics and United States Foreign Policy (New York: Meridian Books, Inc., 1957).

the goals sought, the methods whereby they can be achieved and assumptions about human and institutional behavior." As a result, he continues, by taking a broader view of the legal process, one notices "the legal process has moved much closer to policy, and thus to politics, ethics, morals, and justice."²³

Speaking pointedly to the new need for newer insights of the relation between realism and ethics, De Visscher said:

The hour is not one for doctrinal generalizations moving in the rhythm of a transcendental logic, or for brilliant systematizations in which intellectual ingenuity often counts for more than respect for the facts. It is rather one that challenges us to recognize the limits which in our day the dependence of international law on the historical forms of power distribution sets to its effectiveness, and to seek in the human ends of power the moderating principle that may develop aspirations to international collaboration. Every renewed recognition of the foundations of power stimulates a renewal of values, every return to the realities holds promises of effectiveness.²⁴

These three factors of a sociological approach to international law are guages by which this paper will evaluate the effectiveness and reality of the doctrine of equality of states as a representative element in the whole of international law.

²³Kaplan, op. cit., p. 75.

²⁴De Visscher, op. cit., p. 365.

CHAPTER II

THE DOCTRINE OF NATURAL EQUALITY OF STATES

The first attempt to provide a theoretical foundation to international relations was made by an appeal to natural law. Because of the lack of theoretical precedent from which to construct a more systematic and specific analysis of international relations, the naturalist interpretation of the relations between states was composed, basically, of broad generalities. Nevertheless, these theoretical generalities served as a source through which specific principles, such as the doctrine of state equality, were later deduced by the publicists of the sixteenth and seventeenth centuries.

The principle of the natural equality of states implied, according to Edwin Dickinson, an equality of capacity of rights.¹ This principle was grounded in the following four sources: (1) the law of nature,

¹The equality of capacity of rights is commonly described as simply an equality of rights. This conception does not mean that all states have the same rights, but that all are equally capable of acquiring rights, entering into transactions, and performing acts. Edwin D. Dickinson, The Equality of States in International Law (Cambridge: Harvard University Press, 1920), p. 4. See J. L. Brierly, The Law of Nations, Sir Humphrey Waldock, (ed.) (6th ed.; New York: Oxford University Press, 1963), p. 132.

(2) the conception of natural equality, (3) the idea of the state of nature, and (4) the analogy between natural persons and separate states.²

The birth of the idea of natural law can be traced to early Greek philosophy, particularly to the Platonic and Aristotelian schools.³ Aristotle's conception of law was dualistic in that law was either common, conforming to nature and admitted among civilized men, or it was particular, established by each community for itself.

Law, now, I understand to be either peculiar or universal; peculiar to be that which has marked out by each people in reference to itself, and that this partly unwritten, partly written I call that law universal, which is conformable merely to dictates of nature; for there does exist naturally an universal sense of right and wrong, which in a certain degree, all intuitively divine, even should no intercourse with each other, nor any compact have existed...⁴

The law of nature was merged with ethics by Stoics, a school of philosophers that believed natural law embodied the sum of those principles which are based in human nature, and which determine the conduct befitting man as a rational and social being. Stoicism asserted that the perfect life was one that conformed to these principles by the use of human reason, although they recognized the

²Ibid.

³Ibid.

⁴Aristotle Rhetoric i. 13, 2, as quoted in Ibid., p. 7.

difference between the ideal character of society and its actually existing institutions. Toward the dawn of the Roman Republic, this belief of natural right founded upon reason found its way to Rome where Cicero made it the source and foundation of the highest law, the jus naturale.

While Greek philosophy had emphasized the metaphysical and moral aspects of natural law, Roman thought, under the influence of Cicero, brought natural law into more intimate relationship with actual rules of human conduct and, thus, the jus gentium, a law which represented the real or what was universally established, and the jus naturale came to be regarded as generally synonymous.

In effect, the two aspects of law were the same, although perceived from different points of view, because rules which were everywhere observed, the jus gentium, should surely be rules which the rational nature of man prescribes to him, the jus naturale.⁵

The theories of Cicero, with only slight divergencies, were transmitted to the Middle Ages by the Church Fathers. Nature was identified with God and the law of nature was equated with the unwritten law of God. This idea was stated most succinctly in Gratian's Decretum:

⁵J. L. Brierly, The Law of Nations, Sir Humphrey Waldock, (ed.) (6th ed.; New York: Oxford University Press, 1963), p. 18.

All laws are either divine or human. Divine laws are in accord with nature, human laws with custom; and therefore the latter vary, since some are suited to one nation, some to another... Natural law is common to all nations in that it is adhered to everywhere by the instinct of nature without legislation.⁶

In the thirteenth century, St. Thomas Aquinas taught that the law of nature, one of four types of law which also included eternal, human, and divine law, was that part of the law of God which is ascertained by human reason, in contrast with the part which is directly revealed. The equation of natural law with the laws of God gave the former a position of superiority to the positive laws of human ordinance.⁷

Due to the tendency throughout the thirteenth, fourteenth, and fifteenth centuries to revert to the ancient philosophers and to such ecclesiastical authorities as Gratian and Aquinas, the law of nature became cast in ethical or theological overtones. During the course of the Reformation, however, Protestant writers like John Calvin who did not acknowledge the authority of the Catholic Church or the Canon Law recurred to Roman texts.⁸ Since the Catholic disputants desired

⁶Gratian Decretum Distincto prima 1,6, 7, as quoted in Dickinson, op. cit., p. 20.

⁷Brierly, op. cit., p. 18.

⁸For a good discussion on the early Protestant reformers, see: George H. Sabine, A History of Political Theory (New York: Holt, Rinehart, and Winston, 1961), pp. 354-370.

to meet their Protestant antagonists on even ground, the result was the bringing of classical Roman law into greater prominence, and thereby, preparing the way for the writers of the modern law of nations by placing the discussion of natural law in secular and legal molds.⁹

This secularization of the law of nature became even more evident during the seventeenth and eighteenth centuries. Natural law retained its set of general principles which were to direct the actions of man and the writing of law, but these principles were merged with the idea that they were to be derived from man's observations of reality and his ability to see the operations of the natural laws themselves in the universe. During the Enlightenment and its emphasis on universal principles, writers like Samuel Pufendorf sought to justify obedience to international law with the rationale that it was required by natural laws prescribing human behavior, including relations among states.¹⁰

The origin of the idea of natural equality is vague, although according to Dickinson, it began somewhere in that obscure period between Aristotle's teaching of the natural inequality of human nature and Cicero's idea of the natural equality of mankind. Cicero

⁹Dickinson, op. cit., p. 21.

¹⁰William D. Coplin, The Functions of International Law (Chicago: Rand McNally, 1966), p. 15.

in contrast to Aristotle's belief that "some men are by nature free, and others slaves....," asserted that:

...there is no one thing so like or so equal to another, as in every instance man is to man... And if corruption of customs, and the variation of opinions, did not induce an imbecility of minds, and turn them aside from the course of nature, no one would more nearly resemble himself than all men would resemble all men.¹¹

Natural equality, like natural law, was later incorporated into the Roman jus naturale, although Roman lawyers such as Ulpian, Florentinus, and Tryphoninus recognized the universality of slavery and, therefore, tied the institution of slavery with the jus gentium in order to avoid destroying the idealism of the jus naturale. When Ulpian declared that all men are equal (omnes homines aequales sunt), he intended to affirm that under the ideal jus naturale and insofar as positive law approximated it. By the time of Justinian, however, the idea of equality in the Roman legal system acquired the significance which it was to retain during the Middle Ages.¹²

The concept of natural equality also was influenced by Christian theology. Faith in Jesus Christ destroyed all racial and social barriers to the point that Paul proclaimed, "There is neither Jew nor Greek, there is

¹¹Cicero Delegibus i.10, as quoted in Dickinson, op. cit., p. 13.

¹²Dickinson, op. cit., p. 16.

neither bond or free, there is neither male or female: for ye are all one in Christ Jesus."¹³ Slavery, common during the early Church, was regarded as belonging to the outer man since all men, whether slave or free, were considered equal in capacity for the moral and spiritual life. This idea was expanded by the Church Fathers who believed that men as created by God were free and equal. This conception of equality, much like the one inherent in the Roman jus naturale, recognized the difference between Divine Will of equality for mankind and actual inequality through slavery. The distinction between ideal equality and actual inequality was attributed by St. Augustine to the presence of sin which required coercion to make men observe the principles of justice and right. Coercion was unnecessary in the original state of nature, however, because of the rule of perfect equality.¹⁴

The opinions of the Roman jurists on equality and slavery were conveyed to the Middle Ages by the reassertion of the civilian jurists that equality by the jus naturale was an ideal norm rather than a practical rule. Similarly, the opinions of the Church Fathers on natural equality and of slavery as a coercive measure to insure justice among sinful men were transmitted

¹³Gal. 3:28.

¹⁴Dickinson, op. cit., pp. 17-19.

to the theologians of the Middle Ages. Rufinus, a twelfth century commentator on Gratian, reconciled the conflict between the jus naturale and the jus gentium in regard to equality by including within the former a trichotomy composed of commands, prohibitions, and demonstrations. The commands and prohibitions were unchangeable; whereas, the demonstrations, which included natural liberty, could be changed on occasion so that the true end of natural law might be realized.¹⁵

The foundation of Medieval scholarship on which the writer of the modern law of nations based the materials for their treatises contained few conceptions of greater importance than that of the equality of men by the natural law.¹⁶

The third source used by the sixteenth and seventeenth century publicists who propounded the doctrine of natural equality of states was the idea of a state of nature. While this concept held no great interest for philosophers such as Aristotle and Cicero, it did occupy an important position in the political theories of Seneca during the early Christian era. Seneca believed that a golden age, or primitive state of innocence, preceded the age of conventional institutions:

¹⁵Dickinson, op. cit., pp. 23-24.

¹⁶Dickinson, op. cit., p. 25.

But the first men and their immediate descendents followed Nature; pure and uncorrupt, and held the same both for their leader and the law; by an orderly submission of the worse to the better: for this was ever the rule of simple Nature... What could be happier than the race of man? They enjoyed all Nature in common, she as a kind parent was the protectress of all men; and gave them secure possession of the public wealth.¹⁷

Dickinson noted that the Roman jus naturale had no connection with the primitive state of nature, although the Fathers, on the other hand, were heavily influenced by the idea. They equated Seneca's belief in the Golden Age with the state of man before the Great Fall when he was in perfect communion with God and oneness with his brother through the common possession of materials and, thereby, negating any need for government. Because of sin, however, man fell from this era of harmony and governemnt was instituted in order to provide a semblance of order.¹⁸

The writers of the Middle Ages reproduced the theory of the state of nature in a variety of forms. The civilian jurists frequently justified the presence of institutions which were at variance with natural law by assuming that natural law was much like a primitive condition of man while the actual scioal and political institutions reflected less primitive but less perfect

¹⁷Seneca Ad Lucilium epistularum moralim 90, as quoted in Dickinson, op. cit., p. 26.

conditions.¹⁹ In the scholastic literature of the later Middle Ages, there is also evidence of the theory. Marsilius of Padua began his account of the origin of civil communities with the state of nature. During the fifteenth century, Aeneas Sylvius presented the concept with great literary grace by merging the Biblical version of paradise with the ornateness of pagan philosophy. The theory was inherent in such anti-monarchist treatises as the Vindicias contra tyrannos and George Buchanan's De jure regni apud Scotus during the sixteenth century to buttress their attack on royal absolutism. They asserted that the king's power is delegated by the people when they "renounced as it were the privilege of nature" and created governmental institutions.²⁰ The concept of the state of nature was indeed, "pregnant with possibilities for the seventeenth century jurist, seeking an explanation for the new international society which was gradually taking shape

¹⁹For an example of the influence of such thinking on medieval treatises, see Dickinson, op. cit., p. 28.

²⁰Dickinson, op. cit., p. 28. Although the Vindiciae contra tyrannos was published under the pseudonym Stephen Junis Brutus, the real author is unknown. For additional information on the treatise, in particular, and a good purview of anti-royalist theories, see Sabine, op. cit., pp. 372-391.

in the policy of Europe."²¹

The analogy between natural persons and separate states made its appearance only with the rise of the modern law of nations, although it had roots in certain areas of thought which were characteristic of the Middle Ages. John of Salisbury made one of the first attempts to equate parts of the natural body with parts of the state. The spiritual leadership represented the soul of the state, the prince as the head, the judges and officers as the eyes, ears, and tongue, the senate as the heart, the executive as the unarmed and the army as the armed hand, the treasury as the belly and intestines, and the land folk as the feet. The state was the "individual writ large" to the extent that the protection of the people was equated with shoeing and their distress with gout. Ptolomaus of Lucca believed that as harmony of organic forces exists within the natural body, there is a harmony within the state which, through reason, brings the various forces into correlation and perfects their unity. Engelbert of Wolkersdorf, Marsilus of Padua, and Nicholas of Cues also likened the state to the individual. The analogy of the individual with the organic functions of the state did not develop into the idea of state personality during the Middle Ages, although the medieval publicists had laid the foundation

²¹Dickinson, op. cit., p. 29.

for such development. The medieval belief in the organic concept of the state was not much different from the principles later proclaimed by Hobbes and Pufendorf that civilian institutions are much like human personalities and are, therefore, the subjects of that identical law of nature, which controls natural individuals.²²

Following the Reformation and during the decay of the religiously oriented political system, a new use was found for the four conceptions. Because of the incapacity of either the Emperor or the Pope to command universal obedience, the old theory of a common superior died and the notion of a society of states replaced the idea of a universal empire. Thus, the publicists were faced with the task of finding an explanation for the new society and of shaping the law to meet the new conditions. Generally, the new law was derived from two sources. First, there was a reference to established customs, usages, and understandings. Second, there was an appeal to the law of nature, a law grounded on reason, applicable to the relations between states, and adaptable to that large part of international relations not covered by established custom. There was a tendency to reason that since a common superior no longer controlled

²²Dickinson, op. cit., p. 31; also see: Edwin D. Dickinson, "The Analogy Between Natural Persons and International Persons in the Law of Nations," Yale Law Review xxvi (April, 1917), p. 564.

the relations of separate states, the separate states were in a state of nature with respect to each other, similar to the state of nature which existed for pre-political man, and were, therefore, controlled by natural law. Though deductive analysis, it was easy to conclude from these premises that the principle of natural equality applied to separate states in the international society.²³

It is too tempting to credit Hugo Grotius as the first proponent of the natural equality of states since he wrote the first treatise setting forth a general system of law to govern the relations of States during the first half of the seventeenth century when natural law was used extensively as a rationale behind international relations.²⁴ Nevertheless, Grotius, while asserting the principle of the natural equality of man, never applied the principle to states except in certain particular instances such as his argument for freedom of the seas and his belief that contracts between sovereigns were controlled by the law of nature.²⁵

²³Dickinson, op. cit., pp. 32-33; also see: Kaplan, op. cit., pp. 52-62.

²⁴Corbett, op. cit., p. 12; also see: Grotius De jure belli ac pacis.

²⁵Grotius' arguments for freedom of the seas are in Mare liberum. His comments on contracts between sovereigns are in De jure belli ac pacis, ii, 2, 5. Dickinson noted that Grotius made several implications concerning equal protection of the laws, a meaning

Grotius did not advance the idea that national institutions had been created because of man's abandonment of the state of nature, while nations remained in the natural condition as far as international relations are concerned. He also made no attempt to use the analogy between natural persons and the state as a means of explaining the nature of international relations or of translating the concept of equality into the society of states.²⁶

Perhaps the greatest influence on the development of the theory of the natural equality of states was Thomas Hobbes. By using the whole medieval belief in natural law, the state of nature, natural equality, and the analogy between natural persons and the state, Hobbes prepared the way for men to translate the four concepts into the law of nations by replacing the word "men" for the word "states" and thus, to form a series of postulates strikingly similar to those which dominated thought on international relations for the next two centuries. He stated that once states are created, they acquire the nature of men and that the relations between states are in a natural condition analogous to that prevailing among

somewhat different than the one implied in natural equality, and equality of capacity for rights. (Dickinson, op. cit., p. 35.)

²⁶Dickinson, op. cit., pp. 48-50.

men in the state of nature.²⁷ Hence, it follows that the same law:

...which speaking of the duty of single men we call natural, being applied to whole cities and nations, is called the right of nations. And the same elements of natural law and right, which have hitherto been spoken of, being transferred to whole cities and nations, may be taken for the elements of the laws and rights of nations.²⁸

Samuel Pufendorf is accredited as the theorists who first utilized the thinking of his predecessors and directly applied the four concepts to international relations. The basis of his thought rested on the concept of the state of nature. He believed that the natural state of man contained natural laws of human conduct which, although imposing certain obligations on man, were, nevertheless, imperfect. According to Pufendorf, the only means by which the imperfection of the natural laws could be translated into a perfect law was through the creation of an organized authoritative community, the state. Using the analogy between natural persons and states, Pufendorf arrived at the conclusion that nations live in a state of nature which, like the state of nature for individuals, contains rules based on natural law. The difference between the two states of nature, however, was that while an individual could abandon the natural state for reasons of legal security, nations could not

²⁷Dickinson, op. cit., pp. 69-74.

²⁸Thomas Hobbes Dominion xiv, 4, as quoted in Dickinson, op. cit., p. 75.

abandon the natural state. Yet, the natural state of nations contains fewer legal imperfections since, because of the lack of a higher authority to which nations otherwise would be subjected, it contains a state's greatest assets, ultimate liberty and equality with other nations. "It is this formalistic, mathematical notion of equality, based upon individualism," says P. H. Kooijmans, "that is for the first time presented by Pufendorf as a legal conception..."²⁹

The clearest, most concise explanation of the naturalist position of the doctrine of state equality came from Emeric de Vattel during the mid-eighteenth century.

Since men are by nature equal, and their individual rights and obligations the same as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, count for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom. From this equality it necessarily follows that what is lawful or unlawful for one Nation is equally lawful or unlawful for every other Nation.³⁰

From the later half of the 1700's to the present, it is difficult to indicate the utilization of all four

²⁹Kooijmans, op. cit., pp. 76-79.

³⁰Emeric de Vattel Droit des gens, para. 18 and 19, as quoted in P. H. Kooijmans, The Doctrine of the Legal Equality of States (Leyden, Netherlands: A. W. Sythoff, 1964), p. 84.

concepts in the presentation of the principle of the natural equality of states, although there are evidences of publicists using only one of the concepts. Dickinson noted that such nineteenth century writers as Robert Phillimore and Hannis Taylor regarded equality as a natural right or as a principle which is based upon natural right. Henry Wheaton repeated the idea that the society of states was only a state of nature. Paul Pradier-Fodere, Robert Pielievre, and the early twentieth century publicist Frantz Despagnet explained and justified the equality of states by applying the analogy between natural persons and states as international persons.³¹

Presently, according to P. H. Kooijmans, the idea of absolute, inalienable rights, including the right of state equality, preceding the legal community (This notion is very similar to the theory of the state of nature) is seldom championed. Alfred Verdross, however, does retain the belief that fundamental rights are rights to which the states are directly entitled on the ground of their international legal personality. Verdross' concept of fundamental rights for states parallels the idea of fundamental rights for individuals. When speaking of natural equality, Josef Friedrick Felder appeals

³¹For a good documentation with quotes from primary sources on each of the publicists, see Dickinson, op. cit., pp. 110-115.

to natural laws discovered through human reason. He believes that the criterion needed for determining how the principle of state equality is applicable to existing inequalities and to historical development is justice, a value which is immanently present in all things.

Wilfred Schaumann presents a twofold application of the principle of state equality, one that he terms "egalitar" which is principally formal, and the second that he terms "wertend" which is, on the strength of the particular valuation on which it is founded, principally material. Both are dependent upon whether in a given case equality or inequality should be given precedence. Schaumann noted that the egalitarian or formal solution will lose its character or equality if the actual inequalities require a differentiation of rights and obligations. Thus, for equality to be more than purely formal, it must be based on justice and justice, in turn, must be based on conscience, the human sense of right. The proof for such justice is not logically deduced, but it depends upon belief in the existence of a certain order of values that God gave man. This is a modern appeal to natural law. Schaumann's thought also proceeds from the smallest unit, the human individual, to the greatest, the international community; hence, the substance of the doctrine of state equality is contained in the doctrine of human equality. Consequently, this assertion becomes nothing more than a modern appeal to the historical analogy between natural

persons and states as international persons.³²

At a time when the borderline between peace and war was as thin as between reprisals and piracy, the naturalists' interpretation of international law, in general, and the doctrine of state equality, in particular, was an attempt to analyze and systematize the legal raw material existing in international relations. While the naturalists deduced their systems of the law of nations from no one source, their application of quotations from the Bible, Church Fathers, classical writers, mythology, history, the state practice to interstate activity served the purpose of devising a national system. What might be considered irrelevant to one section of public opinion was considered binding authority to another.³³

Nevertheless, the vagueness of principles such as state equality which the naturalists deduced from their premises was predestined to lead to the principles' mythicizing. The derivation of doctrine from naturalistic methods opened the way for anyone to prove whatever he wanted to prove, and, as Schwarzenberger states, "...chancelleries were not slow in using for their own

³²Kooijmans, *op. cit.*, pp. 215-217; 230-234. For a good discussion of the influence of natural law on modern thinking in international law, see: Joseph L. Kunz, "Natural Law Thinking in the Modern Science of International Law," American Journal of International Law 55 (1963), pp. 951-958; Coplin, *op. cit.*, p. 15; Friedmann, *op. cit.*, pp. 77-79; Kaplan, *op. cit.*, p. 61; and Marek St. Korowicz, Introduction to International Law (The Hague: Martinus Nijhoff, 1959), p. 5.

³³Schwarzenberger, *op. cit.*, p. 11.

purposes such pliable doctrines." Consequently, it was not long before international law was reduced to an ideology of raison d'etat and the scientific value of the deductive method, if not the law of nations itself, was jeopardized.³⁴ A good example of the cheapening of natural law principles and the fickleness with which they were used is the distinction which was often drawn between immutable first principles and the mutable secondary rules. This dichotomy was stated clearly by St. Thomas Aquinas:

A change in the natural law may be understood in two ways. One way is the way of addition; and in that way there is nothing to hinder the natural law being changed... Another conceivable way... is the way of subtraction, that something should cease to be of the natural law that was of it before. Understanding change in this sense, the natural law is absolutely immutable in its first principles: but as to secondary precepts, which are certain detailed conclusions related to the first principles, the natural law is not so changed as that its dictate is not right in most cases steadily to abide by...³⁵

There was no single criterion which determined what was an immutable first principle and what was a mutable secondary principle. The determining factor was inevitably a person's subjective reasoning.

Hence, the suspicion which slowly encircled the naturalistic interpretation of international law spurred an increasing number of attempts to probe more deeply into the deductive reasoning of legal naturalism. Soon,

³⁴Schwarzenberger, op. cit., p. 12.

³⁵St. Thomas Aquinas Summa theologica ii, 90 as quoted in Dickinson, op. cit., p. 22.

it was detected that naturalist law-finding was actually law making in disguise.³⁶ Naturalists never realized that by itself, natural law was too abstract to provide a sufficient support for any legal system. They agreed on the importance of natural law, but they never agreed on the essential character of particular natural laws or principles derived from natural law. The nineteenth century Englishman Jeremy Bentham uncovered the superficiality of natural law doctrine when he wrote, "A great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments, you are to understand are so many chapters and sections of the law of nature."³⁷

The components of the principle of state equality, like the whole of naturalist interpretations of law, are also based on unsound premises. The concept of the state of nature with its implication that men and/or states bring with them into society certain primordial rights inherent in their personality and that these rights form the basis for a legal system is, according to J. L. Brierly, absurd. He said that a "legal right is a meaningless phrase unless we first assume the

³⁶Schwarzenberger, op. cit., p. 12.

³⁷Jeremy Bentham, Principles of Morals and Legislation (Oxford: Clarendon Press, 1879) as quoted in Coplin, op. cit., p. 16.

existence of a legal system from which it gets its validity."³⁸ Edwin Dickinson noted that even if rights such as equality were conceivably an essential attribute of the theoretically perfect state, "the really important consideration is the way in which the law of nations regards actually existing states."³⁹ The theory of the state of nature also implies that international or interpersonal relations is less important, or less natural, than the individuality of the man or the state. In reality, however, individuals and states do not exist in isolation but live in constant interaction with society. Admittedly, an atomistic view of man in society is more plausible than the same view of states in society because it seems to give a philosophical justification to the idea that human personality has certain claims in society and it has been these claims which have assisted in the development of human liberty. On the other hand, however, a state cannot afford to press its claims in the same manner as an individual because of the overwhelming difference in power between a state and an individual. A small state which is content on paving its way in the world without relating itself to other, more powerful nations risks economic and political

³⁸Brierly, op. cit., p. 50.

³⁹Dickinson, op. cit., p. 148.

catastrophe. A nation which refuses to trade and to enter the world bargaining process stifles its opportunity to know economic equality. Also, it is less plausible to apply this atomistic view of the nature of the social bond to states because a state represents only itself. As Brierly said, the need today is not for separateness for individual states, but "for a strengthening of the social bond between them..."⁴⁰ Finally, the concept of the state of nature is a denial of the possibility of evolution in international relations. When it claims that states bring such rights as independence and equality into society, it fails to acknowledge that the attribution of these rights to states is merely a stage in a historical process. Until the last fifty years, states were not regarded as independent or equal and it is naive to think that the development so evident in the first half of the twentieth century has stopped. The real hope for international relations is a movement towards the closer interdependence of states and, therefore, "away from the state of things which this doctrine would stabilize as though it were part of the fixed order of things."⁴¹

The analogy between natural persons and states as international persons, another concept inherent in

⁴⁰Brierly, op. cit., p. 50.

⁴¹Brierly, op. cit., p. 51.

natural equality, is as equally mythological as the concept of the state of nature. About the only similarity between natural and international persons is that both have a legal personality; nevertheless, even this admission is not granting much credence to the theory.⁴² The analogy implies that states use the same criterion as individuals in the process of decision-making and that individual ethics, which includes such ideas as human equality, coincide with international ethics which, according to the naturalist, demands state equality. Emil Brunner, a prominent twentieth century theologian and Christian ethicist, indicates, however, that international ethics, or social ethics, differs from personal ethics inasmuch as they apply to collective institutions and not to individual persons and that intra and international decision-makers are not free to decide for themselves but are bound to the values and goals of the state or international organization.⁴³ It follows from the dichotomy between personal and social ethics that state equality in international relations does not necessarily result from the demand of

⁴²Dickinson, op. cit., p. 150.

⁴³Emil Brunner, "In Search of an International Ethos," Theory and Practice of International Relations, ed. David S. McLellan, William C. Olson and Fred A. Sondermann (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1961), p. 516.

human equality within the state. A state could conceivably grant full civil and political rights to its citizens, yet the state could stand in a position of military and economic inequality to the rest of the society of nations. Also, international ethics does not imply state equality on the same basis as personal ethics implies individual equality. Individual equality in democratic systems, for example, could imply a one man, one vote standard in the governmental process. If this standard for individual equality were applied to international relations, as it was during the Hague Conference of 1907 when a scheme for establishing an international court of justice was wrecked by the refusal of some of the smaller states to accept anything less than equal representation for all states on the court, the development of international law, in general, and of international organizations, in particular, would be stifled because of an unrealistic leveling of nations which have unequal power structures and economic potential.⁴⁴ Kooijmans criticized Wilfried Schumann's attempts to place state equality on the same basis as individual equality by saying:

He accepts the legal personality of the individual in international law and examines it more closely and in a most interesting manner, attaching great value to the co-operation and co-determination of the individual in international law. He observes

⁴⁴See Brierly, op. cit., pp. 132-133.

that this co-operation is chiefly dependent upon the manner in which it is guaranteed to the individual in the national sphere. All this leads Schaumann to the conclusion that equality of states can only then be fully realized if the state-communities have been built up according to the principle of self-determination and in their structure give evidence of an order that does not only give due consideration to the individual, but also to the various groups existing within the state. This means in concreto that equality in international law can only attain its full content with regard to those states that have accepted the democratic system in the Western sense.⁴⁵

Kooijman's perceptive statement indicates another flaw in the use of the analogy for constructing a theory of natural equality. Basically, natural law doctrines are products of a Western society and, consequently, it becomes easy for a naturalist to identify the standards of state equality with a Western oriented democracy based on the equality of the individual. Such interpretations do not identify with a non-Western world because it "does not share the, ultimately religious values of Judaism and Christianity from which the deductive systems of Western naturalist thinkers of the sixteenth and seventeenth centuries stem."⁴⁶

The mythicizing of the doctrine of natural equality is most evident by its failure to conform to the basic tenets of a sociological perspective of

⁴⁵Kooijmans, op. cit., pp. 235-236.

⁴⁶Schwarzenberger, op. cit., p. 152.

international law. First, the doctrine is unrelated to political and social realities. Naturalists must realize that legal systems are particular legal systems, "related to particular communities and to particular social and political structures, and composed of particular norms determined and enforced through particular institutions."⁴⁷

Hence, what actually takes place in the real world is split with situations described as big or little, powerful and weak, rich and poor, and these situations cannot be divorced from the self-centered participants in the political process regardless of whether these participants are individuals or nations. "It is a long jump," according to Kaplan, "from the general necessity for a legal system to a particular one, from the abstract necessity of norms to particular rules and from the ideal rule to workable law-rules."⁴⁸ Simply propounding the principle of state equality deduced from a natural law and discovered through human reason does not bring a theoretical manifesto closer to realism where a viable system of law can be fashioned. Also, naturalists often fail to describe how their principle can be enforced. Enforcement and human intuition are not synonymous, especially when an interpretation of intuition is as varied as types of individuals. Funck-Brentano recognized this

⁴⁷Kaplan, op. cit., p. 61.

⁴⁸Kaplan, op. cit., p. 61.

problem faced by the naturalists when he said:

Civil and political equality among the subjects of a single state may be conceived in a way to establish equality and guarantee its practice; but among states there is no public authority; equality has no other foundation and no other guarantee than the customs of nations, differences in national character, intellectual culture, moral progress, political traditions, productivity and finally, of geographic situation destroy all real equality with states.⁴⁹

The above statement was made in the 1870's. Two world wars, the Communist movement, the horrors of Belsen and Auschwitz, the fate of Hiroshima, and the "principled" action of intervention in Hungary serve, however, as a contemporary addendum to Funck-Brentano's analysis and reminds the naturalists that their unrealistic espousal of state equality overemphasizes stability to the point that it becomes inert. Hans J. Morgenthau's idea that international law is primarily a static social force which disguises a policy of the status quo is applicable to the doctrine of natural equality, although, as indicated in Chapter I, it unduly condemns the whole of international law. The doctrine implies that inequality is a matter of fact while equality is a matter of law. Yet, when this rationale is used, as it was during the "Europeanized" balance of power system of the last century, the law is crystallized around the prevailing order of international relations. When pressed for an explanation between

⁴⁹Funck-Brentano, Precis du droit des gens (Paris, 1877), as quoted in Dickinson, op. cit., p. 133.

factual inequalities and legal equality, publicists, according to Dickinson, appeal to reason, although "reason...is only the publicists' opinion as to what the law ought to be."⁵⁰ Reason fails to serve as a catalyst in the development of international law. It only perpetuates an ideal and immobile legal system. Theory must bear some relation to practice; otherwise, theory becomes a static set of principles which fail to evolve with the changing structure of international relations. "International law," asserts Gaston Friedmann, "can no longer be regarded as one body of principles, rather it is a general description of various patterns and levels of international legal relations..."⁵¹

Third, the naturalists are also guilty of wrapping their doctrine of state equality in moral absolutes. Rather than achieving a practical system of ethics by combining their moral values with a combination of legal processes and political and social realism, naturalists attempt to force political inequalities into inflexible molds by appealing to a mythological state of nature or to an erroneous analogy between individuals and states. Consequently, political and social realities are crushed under the weight of naive idealism. Often, as Friedmann notes, even the espousal of what ought to be is a

⁵⁰Dickinson, op. cit., p. 57.

⁵¹Friedmann, op. cit., p. 367.

disguise of a particular political or legal philosophy. Even in Grotius' time, this dilemma of postulating moral absolutes in a world deeply divided by conflicts of national interests and social values was obvious. Grotius, a Dutchman, represented his nation's best interests by propounding the freedom of the seas as a principle of natural law. Yet, at the same time, John Selden, an Englishman, represented his nation's interests by asserting that natural law permitted private and public dominion of the seas. A recent example of the use of natural law to support a contentious position in a basically political controversy is F.A. Mann's assertion that the payment of prompt and adequate compensation in the cases of nationalization of foreign industry is a principle of natural law.⁵² Inevitably, such stretching of natural law principles breeds a contempt for the high moral values which they have traditionally represented. With the constant struggle of divergent philosophies and values in international relations, it requires, as Friedmann says, "a remarkable degree of self-assurance to know that one's own political philosophy, whether implemented in a majority or a minority of legal systems, represents the order of God or Nature, while the rest of mankind stands condemned."⁵³

⁵²Friedmann, op. cit., pp. 75 and 73.

⁵³Friedmann, op. cit., p. 79.

In summary, the doctrine of natural equality is a myth. It offers little insight for the creation of particular legal systems grounded in political and social reality. It remains in a state of inertia which fails to respond to changes in the structure of international relations. It propounds moral absolutes which fail to construct realistic means to achieve ethical ends.

CHAPTER III

THE DOCTRINE OF THE LEGAL EQUALITY OF STATES

As natural law doctrine fell into greater disrepute, the role of political factors in international relations increased. States, under nationalist pressure, more openly followed policies of power and, consequently, a "necessary" law based on human reason and separated from political realities ceased to be a viable means of analyzing law. During the seventeenth century, however, there was a tendency to dissociate the law of nations from the law of nature and to regard it as nothing more than the rules emanating from agreements between sovereign states.¹ Charles De Visscher says, "The

¹The legal disassociation from naturalism and the identification with agreements between states, or state wills, is termed "positivism." For the purposes of this chapter, it is necessary to note that a positivist approach to the doctrine of state equality is usually designated as the "legal equality of states," and, normally, the type of positivism referring to legal equality is voluntaristic positivism. (See footnote number 2 in Chapter I for a brief explanation of the different types of positivism, including voluntaristic positivism.) Hence, when this chapter uses the term "legal equality," it refers to a voluntaristic positivism and its conception of the doctrine. For examples of the use of the term "legal equality," see: P. J. Baker, "The Doctrine of Legal Equality of States," The British Year Book of International Law, IV (1923-1924), pp. 1-21; Philip C. Jessup, A Modern Law of Nations (New York: The Macmillan Co., 1948), pp. 26-36; P. H. Kooijmans, The Doctrine of Legal Equality of States (Leyden, Netherlands: A. W. Sythoff, 1964), pp. 126-151.

characteristic of such thought was an attitude, not of negation, but of scientific indifference touching the existence of an objective order superior to the law established by human will."²

Richard Zouche was one of the first publicists who foreshadowed this tendency toward positivism. While serving as a Professor of Civil Law in Oxford University and a judge of the Court of Admiralty in 1650, he wrote the first manual on the positive law of nations.³ He recognized the supremacy of positive or conventional law over the natural by deducing the law between nations from the customary practices of nations and from written agreements. He made no attempt to elaborate on the doctrine of the natural equality of states. Rather, he recognized both inequalities of sovereignty and precedence and these inequalities of legal capacity, he believed, had the force of law.⁴

Later in the seventeenth century, Samuel Rachel and J. W. Textor also espoused an international law developed "by the consent or agreement, either expressly or tacitly given, of many free nations, whereby for the sake of utility they are mutually bound to one another."⁵

²De Visscher, op. cit., pp. xi, 50-51.

³See Richard Zouche Juris et judicit feciales, sive juris inter gens, 1650.

⁴Dickinson, op. cit., pp. 91-92.

⁵Samuel Rachel De jure gentium, para. 91, 208 as

This conception of the law of nations was completely arbitrary and at variance with natural law because it might, on the basis of consent or treaties among nations, establish as legally just a legal precedent which would be condemned by conscience. Rachel and Textor, while apparently regarding the natural equality of states, assumed that natural equality could be modified by the positive law of nations.⁶

One of the leading proponents of positivism during the eighteenth century and often regarded as the father of modern positivism was Johann Jakob Moser. He rejected the law of nature and natural equality and, like his predecessors, derived the law of nations from custom and treaties. He was the first publicist, however, who championed an absolute equality based on sovereignty, although this absolute equality was limited to fully sovereign states.

A state that is independent, that is, one over which no other state or ruler has any authority, is called sovereign... Independence gives equal rights. As regards the rights resulting from independence all fully sovereign states are equal to one another; on the other hand, semi-sovereign states are unequal to sovereigns.⁷

While Moser rejected natural equality, he, according to P. H. Kooijmans, owed much of his thinking

⁶Dickinson, op. cit., p. 92.

⁷Johann Jakob Moser Versuch des neuesten Europaischen Volkerrechts in Friedens-und Kriegsten i, 1 as quoted in Dickinson, op. cit., p. 94.

on sovereign equality to natural law. The existence of states in a state of nature, without a higher authority to which the states are subject, logically leads to the notion of sovereignty in the sense that each state is master of its own affairs. Hence, while Moser abandons a naturalistic interpretation of state equality, he does retain the concept of state equality and equates it with sovereignty. For Kooijmans, the principle of state sovereignty is the most important basis for the legal equality of states. He says, "If sovereignty is considered to be the essence of the state, at least with respect to the legal sphere, the conclusion may easily be drawn that states are equal."⁸

Yet, to suggest that legal equality depends on sovereignty is speaking only in generalities. The

⁸Kooijmans, op. cit., pp. 90 and 216, Kooijmans says that a modern notion of state equality is also connected with sovereignty. "Whether construed as a fundamental right of the state, as an attribute of sovereignty, or as a fundamental principle of international law,...we always find that the principle of equality is very closely linked up with sovereignty." (Kooijmans, op. cit., p. 91.) Although the concept of sovereignty equality originated in the eighteenth century, the term "sovereign equality" was first enunciated in Paragraph 4 of the Four-Power Declaration on General Security adopted at the Moscow Conference on November 1, 1943. It had thereafter been embodied in the Dumbarton Oaks Proposals, and ultimately in Article 2, Paragraph 1 of the United Nations Charter. United Nations, General Assembly, Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States (A/AC. 119/1.6, Nov. 16, 1964), p. 148. See also Appendix A.

general notion of sovereignty says nothing about the substance of state equality; therefore, for one to understand the components of legal equality, he must first understand what individual theorists mean by sovereignty.⁹

While the publicists writing before the First World War did not all interpret the principle of legal equality in the same manner, they did believe that state sovereignty was the essence of this equality.¹⁰ Their conception of sovereignty was similar to Hegel's in that the state is the highest power on earth, is perfection personified and, consequently, is sovereign and independent in its relations with other states. No gradation in legal personality among states is possible since this would conflict with a state's absolute sovereignty and since this absolute sovereignty admits no higher authority which could command such gradation. This independence can only be restrained by the will of the state itself. A state's relationship to another state is often expressed through treaties which ought to be observed although this intended observation, according to Hegel, is not grounded in reality. Reality is realized only by a state's will expressed in sovereign

⁹Kooijmas, op. cit., p. 127.

¹⁰Kooijmans indicates that while Friedrich von Martens considered legal equality as an attribute of the state, Charles Calvo, Georg Jellinek, and Paul Heilborn considered it a fundamental principle in international law. (Kooijmans, op. cit., p. 127.)

freedom, and the only criterion by which to determine whether a state wills to obey or disobey treaty obligations is the demand of the state's welfare at a particular time.¹¹

Since states are related to one another as autonomous entities and so as particular will on which the very validity of treaties depends, and since the particular will of the whole is in content a will for its own welfare pure and simple, it follows that welfare is the highest law governing the relation of one state to another.¹²

Strictly adhering to the notion of the state's will, but desiring to avoid the consequence of Hegelian absolutism in order to come to a legal system for international intercourse, Georg Jellinek introduced during the 1880's the term "self-limitation." This concept implies that a state's consent is necessary in order for the state to be legally bound and once the state is legally bound, it cannot withdraw from its obligation by altering its will. The creation of an obligation restrains the will of a state, yet this obligation is not imposed by an authority higher than the state since such an authority is non-existent in international society, but by the individual state's recognition of the necessity of certain acts in the common interest. A

¹¹Kooijmans, op. cit., pp. 128-129.

¹²G. W. F. Hegel, The Philosophy of Right, trans. T. M. Knox (Oxford: Clarendon Press, 1965), p. 214, para. 336.

particular norm is given legal validity only by the recognition of that norm by the will of the state in concert with the plurality of the declared individual state wills. Kooijmans notes, however, that since the norms applying in international society have no legal validity until there is recognition by the states, "it is incomprehensible that they should continue to apply and remain real legal rules, if the states should change their will upon which this recognition is based."¹³ Caught between the search for a higher objective order and respect for sovereignties, Jellinek ultimately defers to the latter.¹⁴

Heinrich Triepel recognized Jellinek's dilemma and attempted during the 1920's to offer an approach which replaced the idea of the will of the individual state with the notion of the superior will, a will shared by all states for a common objective. This superior will, or common will, was supposedly different from Jellinek's theory which implied an accidental concurrence on the declared individual state wills. Triepel's notion of a superior will bound the individual state, and consequently, the superior will could not be affected by a subsequent change in the will of the state. Triepel's dual dilemma, however, was that, first, he could not explain the common will without connecting it with the will of the state

¹³Kooijmans, op. cit., pp. 131-132.

¹⁴De Visscher, op. cit., p. 50.

itself. As Kooijmans says, "...the common will is of the same time its own will..." Second, since there was such a close connection between the individual state will and the common will, he failed to explain adequately why a common will would continue to bind a state even after a state had changed its will.¹⁵ Thus, Triepel's theory became nothing more than tautology.

While Jellinek and Triepel attempted to avoid Hegelian notions of absolute sovereignty, they propounded theories which, in effect, did little to restrain state sovereignty. Ultimately, as indicated above, their theories retained the belief in the state's will and its ability to either validate or invalidate law. Regardless of the theories' inabilities, they held important considerations for the doctrine of legal equality. The sovereignty of a state, best expressed in the will of the state, is as valid as the sovereignty of another state. There is no gradation of sovereignty among states since, as Hegel said, this would conflict with the states' common claim to absolute, unimpaired sovereignty and since this absolute sovereignty among states precludes the creation of a higher authority which would command this gradation. Not wanting to equate the sovereignty of a state with its power, however, Jellinek and Triepel

¹⁵Kooijmans, op. cit., pp. 132-134.

asserted that a state is limited by the rights it recognizes in another legal person, the foreign state. A foreign state exists as a legal personality only after it is recognized by the other state, although once it is recognized, it will function as an equal in law with the other sovereign states. Differences in power, territory, and population are irrelevant because the recognition of a state is a recognition of its sovereignty. One of the first principles that can be deduced from this absolute legal equality of states is that a state cannot be forced against its will to accept a certain legal rule. This implies that a majority decision cannot bind a state which did not consent to the decision. Hence, the only valid process of establishing legal norms is through the rule of unanimity.¹⁶ This idea was best expressed by the Brazilian representative to the Second Hague Peace Conference of 1907 when he was opposing the idea of privileges for the Great Powers on the proposed Permanent Court of Arbitration.

Sovereignty is the prime and elemental right of constituted and independent states. Therefore, sovereignty signifies equality. In theory, as in practice, sovereignty is absolute. It knows no grades. The juridical administration of law is a branch of sovereignty. If there must be among States a common organ of justice all States must have a necessity an equivalent representation.¹⁷

¹⁶Kooijmans, op. cit., pp. 136-138.

¹⁷Kooijmans, op. cit., p. 146.

Early in the twentieth century, Georges Streit also identified with a positivist conception of state equality by asserting that regardless of the actual practice of the Great Powers, actuality never attains legal force until it is recognized by the smaller states. Although the rights of smaller states were continually infringed by power blocs, the infringement of those rights, according to Streit, were invalid unless the smaller states acquiesced in such infringement. He concluded with the idea that absolute legal equality was one of the foundations of international law. Consequently, an international organization based on legal inequality between the Great Powers and the small states, provided they refused to recognize the rule of inequality, could not exist since the organization would fail to reflect an international society composed of independent and sovereign powers. "No other kind of community is possible in the eyes of Streit and the positivists," says Kooijmans, "because this would overthrow their notion of sovereignty and their conception of the will of the state as binding legal foundation, and therefore their entire conception of law."¹⁸

Gleaning from the theories of Jellinek, Triepel, and Streit and their emphasis on equality before the law, this chapter interprets the doctrine of legal equality of sovereign states to imply, first, an equal participation

¹⁸Kooijmans, op. cit., pp. 144-145.

in the formulation of law, including the rule of unanimity, and second, an equal protection of the laws. These two tenets of legal equality, according to voluntaristic positivism, must be absolute, regardless of political inequalities. Thus, it is contrary to the demands of legal equality when the Great Powers, without obtaining the consent of the smaller states, establish rules which are considered binding for the entire international society.

In order to evaluate properly the validity of the doctrine of legal equality, it is necessary to understand the political realities during the height of positivist theory, to contrast the realities with the two basic tenets of legal equality and, finally, with the aid of a sociological perspective of international law, to determine the role of the doctrine in modern international law.

During the nineteenth and the first decade of the twentieth centuries, international law was limited to a specific group of European states. These states formed a closed society which only explicitly admitted members, such as Turkey during the Peace of Paris of 1856. Colonialism remained, in effect, outside the confines of international law, except when two or more competing European colonial powers came into conflict. As colonialization expanded, international law expanded, but its reach extended only to the European states which settled in the territories concerned. While treaties between powerful European states and smaller states were

frequently observed, the primary consideration was the smaller states' utility as military allies or as reservoirs of natural resources for the larger states.¹⁹

Morton Kaplan notes that with respect to the major states during the balance of power system, the positivist emphasis on sovereignty conformed fairly well to the facts. No state contained such a preponderance of power that it interfered with the internal affairs of other states, plus the fear of military reprisal by an alliance of European nations prevented most nations from scorning the rule of non-interference. While the logical difficulties in the notion of absolute sovereignty were evident, they did not affect the concept's practical adequacy in explaining what took place. "The absurdity of auto-limitation as an explanation of international law," says Kaplan, "should not obscure the fact that the concept reflected the real needs that the community of nations had in protecting the myth of sovereignty."²⁰

Nevertheless, during this same period, there was little validity for the doctrine of sovereign equality which, in theory, allowed no gradation among states unless such gradation was recognized by both large and small states. Political and military gradation, however, was the rule of the day, for it was the large European

¹⁹Kooijmans, op. cit., pp. 91-92.

²⁰Kaplan, op. cit., p. 37.

powers which made or redressed the balance of power system and whose independence was essential to the maintenance of the minimum number of nations necessary to "balance." Any "sovereign" status for smaller states in Europe and, after the Monroe Doctrine, in Latin America was guaranteed by the major nations for two reasons. First, the flexibility in the balance of power system prevented any viable division of smaller European countries. Second, the acquisition of these smaller states was hampered due to the problems of assimilation into different national cultures. The rulers of the smaller states, on the other hand, **acknowledged** the fact that the protection of their sovereignty was the result of the balance of power system which they could not influence to a noticeable extent. Yet, they also acknowledged the fact that the power system worked to their advantage. While avoiding dominion by any particular nation and scrupulously respecting the sovereignty of the larger nations, they also insisted upon their own status as "sovereign" states.²¹

During this period, sovereignty for small states was not related to nationalism or self-determination. The dichotomy between the hegemony of the great nations and the rest of the world was taken for granted and equality of rights and freedom from intervention was

²¹Kaplan, op. cit., p. 38.

applied only to the civilized or Christian states. While any form of intervention in the administration of states which were of strategic military and political importance was intolerable, intervention in other parts of the world was tolerable and might even enhance a strong state's national interests. It was not uncommon for European powers to transport their culture, complete with religious values and political philosophy, to those parts of the world where intervention was "legitimate." Consequently, through a desire for economic gain and for an increase of national capabilities, the colonial powers relegated large areas of Asia, the Middle East, and Africa to an inferior status in the international system. In effect, the majority of the world's population and territory constituted a source of difficulty because, according to the large nations, it was not capable of participating responsibly in international politics and because it lacked modern political systems. By placing certain of these areas under protectorate, individual European powers prevented other major nations from conquering them and also ridded potential sources of instability in international politics.²²

Even after the termination of the balance of power era, the double standard imposed by the Great Powers on the smaller states remained. The League of Nations

²²Kaplan, op. cit., p. 95.

failed to provide legislative authority to change the status quo. In fact, Article 10 of the Covenant explicitly required the maintenance of the territorial status quo established by the peace treaties:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in the case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.²³

Thus, without establishing political organs that could legislate peaceful changes, the League required its Members to perpetuate a juridical status quo against forcible change. Nevertheless, the League recognized Poland's forcible change of its border with Lithuania. The primary reasons for this violation of the Covenant was that France, one of the major powers in the League's membership, had a great interest in a strong Poland which could wield a countervailing influence on Germany. The League's ruling elite knew that territorial infringement of a small state by a large state rarely involved the threat of war. In reality, therefore, Article 10 was restricted to aggression which, by affecting the interests of the major states, created a threat of war.²⁴

Specifically, the contrast between the realities of international relations and the two basic tenets

²³League of Nations, Covenant, Article 10.

²⁴Kaplan, op. cit., p. 287.

inherent in the doctrine of legal equality stirred additional doubts in the credibility of the doctrine. The notion of the equal participation of states in the formulation of law survived only as a myth. Then, as now, states, technically speaking, participated equally in the drafting of the treaties which they signed and in the practices from which customary laws emerged. In reality, however, the strong state left a much deeper imprint on a treaty than its weaker partner and a multi-lateral treaty was largely the product of compromise among the major powers. While customary law was derived from general practice, the practice was considered general if most of the states, including all great powers, accepted it.²⁵ It was one thing for the state to refuse to be bound by rules of law to which it had not agreed and quite another to participate equally in the making of new rules.²⁶

The Congress of Vienna in 1815 best epitomized the dominance of the Great Powers in the formulation of law. There, the large European powers assembled not only to legislate for Europe, but for the world. The Congress marked a formal recognition of the political system which

²⁵W. W. Kulski, International Politics in a Revolutionary Age (New York: J. B. Lippincott, Co., 1964), p. 449.

²⁶Fenwick, op. cit., p. 223.

was to govern international relations for the rest of the century. International law had to conform to the realities of an international political mold filled with competitive, suspicious, and opportunistic European nations which insisted on flexibility of alignment. For all practical purposes, according to Kaplan, "international law was Europeanized."²⁷

Throughout the nineteenth and during the twentieth centuries, the Great Powers did not hesitate to settle specific problems which involved their common interests by meeting periodically to legislate rules which had the force of law. The Congress of Paris in 1856, which consisted, for all practical purposes, of the major nations, met to consider new rules of war of sea.²⁸ The result of the meeting was a declaration which, like most other declarations of that period, stated, "...the present Declaration is not and shall not be binding except between these Powers who have acceded or shall accede to it." While being an example of general international law, it was binding only on those states who had participated in its formulation. The Berlin Congresses of 1878

²⁷Kaplan, op. cit., p. 62.

²⁸Fenwick, op. cit., p. 223.

and 1885 acted as de facto executive bodies during the partitioning of Africa and the reconstruction of the Balkan states. The Conference of Algericas of 1906 legislated on Moroccan problems and the London Conference of Ambassadors intervened in the Balkan situation in 1913 and emancipated Albania.²⁹

The Paris Peace Conference of 1919, composed of the United States, France, Great Britain, Italy, and Japan and which officially called themselves the "Principled Allied and Associated Powers" while designating the other participating states as "Powers with limited interests," was conducted primarily by the Big Five to the complete negation of the doctrine of legal equality. The voting procedure, established by the major nations, gave five votes to each of the five Great Powers; three each to Belgium, Brazil and Serbia; two each to Australia, Canada, China, and Greece, Hedjaz, India, Poland, Portugal, Rumania, Siam, South Africa, and Czachslovakia; one each to the remainder of the states. The Commissions and the plenary meetings were planned and directed by the larger states. The actual programming was undertaken by the Council of Ten composed of the five prime ministers and the five foreign ministers of the Big Five and, consequently, the plenary sessions were little more than

²⁹Fenwick, op. cit., p. 223.

listening sessions sponsored by the Council. As Robert Lansing, then Secretary of State of the United States, said, "It was medieval rather than modern, despotic rather than democratic. It was in one sense a farce, but in another, it was a tragedy."³⁰

On September 29, 1938, Great Britain, France, and Germany signed the Agreement Concerning the Sudeten-German Territory in Munich. The preamble of the Agreement stated that the signatories acknowledged the cessation of the ~~Sudetenland~~ in Czechoslovakia to Germany and "have agreed on the following terms and conditions governing the said cession and the measures consequent thereon, and by this agreement they each hold themselves responsible for the steps necessary to secure its fulfillment." The nation which had suffered the loss of a fourth of its territory to Germany was not invited to the Conference nor was it consulted during the signing of the Agreement. The loss of Czechoslovakia's territory made it susceptible to German aggression, which occurred only six months after the Conference.³¹

During and after World War II, the 1943 Moscow Conference, the Yalta Conference, and the meetings of Dumbarton Oaks, the lineage of the Great Powers concept continued and today it is reflected in the structure of

³⁰Korowicz, op. cit., pp. 259-260.

³¹Korowicz, op. cit., pp. 268-269.

the Security Council of the United Nations.

The rule of unanimity also stood at variance with political reality. The League of Nations, while affirming the rule in its Covenant, benefitted from the mistakes which the Hague Conference of 1907 made in attempting to incorporate the small states' demands for unanimity in the proposed Permanent Court of Arbitral Justice and of the International Prize Court.³² C. Wilfred Jenks notes that "the League grew primarily by outgrowing the principle of unanimity proclaimed by the Covenant."³³ Through a series of constitutional conventions, the rule was relaxed. New powers and functions providing for majority decisions were given the Council, one of the League's major organs which consisted of both permanent and elected members and which dealt with the League's most pressing political problems. The cooperative action implemented by an individual state's response to its obligations under the Covenant no longer required unanimity, as was best exemplified by the application of sanctions during the Ethiopian war. Jenks says:

In a variety of subtle ways the formal requirement of unanimity was tempered by "the very human desire not to be isolated, which prevents a real insistence

³²Korowicz, op. cit., p. 251.

³³C. Wilfred Jenks, "Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations," Cambridge Essays in International Law, ed. R. Y. Jennings (London: Stevens and Co., 1965), p. 49.

on the principle of unanimity by small minorities on ordinary occasions." It was this tempering and mellowing of the principle which made the League as effective as it was, but the principle nevertheless handicapped the League throughout in seeking budgetary resources adequate for the proper discharge of its responsibilities and doomed it to frustration at vital points in its history, notably at the crisis of the Manchurian dispute which marked the beginning of its decline and fall.³⁴

The rule of unanimity continued to be used and even today it forms the basis of the North Atlantic Treaty Organization and of the Organizations for Economic Co-operation and Development, although Jenks notes that the rule of unanimity is generally considered obsolete and can operate only within a "relatively homogeneous organization with a highly developed sense of common purpose."³⁵

The notion of the equal protection of the laws for all states, the second basic tenet inherent in legal equality, also existed only as a myth. It was this concept which was diametrically opposed to the events preceding the First World War. Theoretically, the sanctions of international law held good for the protection of both weak and strong, but the principle's inherent shortcomings began to appear when the best sanctions were inadequate and an injured state was left to its own limited resources to defend itself against attack or to maintain its claims against a much stronger state. China's role as a pawn

³⁴Ibid.

³⁵Ibid., p. 50. It is not within this chapter's purpose to present alternating means of voting, however,

during the Russo-Japanese war, for example, was considered by international public opinion as being relatively unimportant. In 1910, when Korea was deprived of its very existence as an international person, the "protective" qualities of international law were ineffective.³⁶

Following the First World War and during the implementation of the provisions of the League Covenant concerning the protection of minorities, the Great Powers compelled fourteen other states, but not themselves, to accept the Covenant's obligations. Consequently, the Great Powers did not act for the benefit of the international organization, but only for themselves. Noting the violation of both the equality of rights in individual relations of States and the legal equality of States, Korowicz says:

The equal protection by international law of the sovereignty of the contracting parties was refused to the States subjected to the regime of the international protection of minorities. Restrictions were imposed on the sovereignty of one contracting party by the other contracting party in behalf of the former's citizens.³⁷

Japan's invasion of Manchuria in the 1930's was a flagrant violation of the equal protection of the laws, but the League remained idle. Four years later came the

for an excellent discussion of alternate voting procedures, see Ibid., pp. 52-63; also Korowicz, op. cit., pp. 265-266.

³⁶Fenwick, op. cit., p. 221.

³⁷Korowicz, op. cit., p. 268.

attack upon Abssynia and this produced a chain reaction of sudden absorption of one "sovereign state" into another.³⁸ The absorption of smaller states by the Axis Powers during the Second World War and the failure of the United Nations to provide for the equal protection of the laws in Hungary, East Germany, Korea, Cuba, and South Africa provide more recent examples of the principle's infringement.

Contrasted to the domestic situation where the state guarantees equal protection of law for the rights of its individual citizens, the international situation gives no recourse to a super state institution. Consequently, as Kulski says, "the equal protection of the rights of the state, which international law recognizes, cannot be enforced against the bad faith of a strong law breaker."³⁹ Since treaties, like domestic contracts, add and subtract rights, states have unequal rights and duties under treaty law. A commercial treaty, for example, confers on the signatories the right to import their goods after the payment of lower custom duties than those which the nonsignatories must pay. At the same time, however, the commercial treaty restricts their freedom of tariff regulation. A treaty can create both a state

³⁸Fenwick, op. cit., p. 222.

³⁹Kulski, op. cit., p. 448.

of inequality between the signatories and the nonsignatories and even for the signatories themselves. A commercial treaty constructed between an advanced and a new, weaker nation might guarantee the national treatment of their respective citizens and corporations in the territory of the other contracting party. Legally, the weaker nation is given full reciprocity by the treaty, but in reality the weaker nation is in an unequal position. While the provision of "equality" yields an important concession to the advanced country whose business firms operate in the underdeveloped country and guarantees the same rights which local businesses have, the new state finds that, in the name of legality, it has been placed in a disadvantageous position because it has no business forms in the territory of the advanced state.⁴⁰ Perhaps a fear of such treaties is what motivated a Cyprian representative to suggest that the analogy drawn with private law in cases of invalidation of contracts concluded under duress should apply to international agreements concluded when two or more parties were in an unequal bargaining position.⁴¹

⁴⁰Kulski, op. cit., pp. 448-449.

⁴¹United Nations, General Assembly, Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States (A/AC. 119/L.1, June 24, 1964), p. 110.

Finally, in order to evaluate properly the validity of the doctrine of legal equality, it is necessary to determine, with the aid of a sociological perspective of international law, the role of the doctrine in modern international law. First, the consequences of the doctrine's construction of the dichotomy between legal equality and political inequality must be examined. Because voluntaristic positivism is concerned only with state wills, thereby excluding the ethical, political, and social factors which are the foundation and ultimate explanation of law, it strengthens an intransigent conception of sovereignty during times when vast upheavals call for radical revision.⁴² By failing to construct its theories of legal equality from facts inherent in the world structure, positivism achieves results which make no real contribution toward the development of a viable world order.⁴³ Rather than constructing a spirit of community, positivist theories emphasize sovereign independence and competitiveness. It stresses the idea that no legal system, partnership, or inequality, even if the inequality is based on special interests such as conferences governing the exchange of commodities grown or

⁴²De Visscher, op. cit., pp. 51-52.

⁴³Kooijmans, op. cit., p. 99.

produced only by a few states, is valid unless it is recognized by all states. Kooijmans notes that political inequality is a fact that cannot be omitted in the construction of law. He quotes John Westlake who said:

It is true that politics are not law, but an adequate notion of law cannot be gained without understanding the society in and for which it exists and it is necessary for the student of international law to appreciate the actual position of the great powers...⁴⁴

Georg Schwarzenberger gives reasons why attention needs to be given to world powers. Assuming the same degree of law-abidingness as smaller states, large, more powerful nations have to consider a multitude of factors which enable them to view any topic more comprehensively than a small state. If the interests of the Great Powers are connected with more than one continent and are not limited to land or sea powers, then their extensive responsibilities lead to a more remarkable balance in their views.⁴⁵

Another consequence of the positivist interpretation of state equality is that its fixation on legalism can give a nation a false sense of security. The Kellogg Pact, for example, made many Europeans feel secure behind the screen of its prohibition of all wars. The world, with

⁴⁴Kooijmans, op. cit., p. 99.

⁴⁵Schwarzenberger, op. cit., p. 29.

the exception of Germany, admired France's Maginot Line until the French defense fortifications crumbled under German militarism.⁴⁶ A small state's appeal to legal equality without a pragmatic application of political realities leaves the state with a meaningless principle without methods for its realization. Consequently, a state's legal security is crushed when the Great Powers turn the notions of the equal participation in the formulation of law and the equal protection of the law to their own advantage.

Second, the doctrine of legal equality consists of a body of formal static rules. By reducing international law and, particularly, the idea of state equality to agreements between state wills, voluntaristic positivism condemned international law to immobility. Generally, however, positivist doctrine and its static posture correspond to the general spirit of the age of its inception. The nineteenth century, being a period of relative calm and prosperity, placed a high premium on stability.⁴⁷ Georges Streit's theories on the impossibility of creating an international organization because of its inconsistency with an international society composed of independent and sovereign powers is an example

⁴⁶Kulski, op. cit., p. 450.

⁴⁷De Visscher, op. cit., p. 52.

on nineteenth century positivist stress on stability.⁴⁸ Such thinking, as Friedmann suggest, discourages inquiry into the interrelation between the changing needs of society and the response of the laws. Contrary to the relation of natural sovereignty to international order, positivist doctrine tends to regard international law in relative isolation from the constant evolution of the political and social structures of international society. It tends to take the existing law, developed largely by custom and treaty, as fixed. Since it considers the state, which it believes to be the sole subject of international law, also immune to internal political and social transformations, it joins hands with naturalist thinking by discouraging "the sociological inquiry into the interrelation between international law and the international society."⁴⁹

Third, because of the positivist separation between law and reality and the immobility of a law developed through state wills, there also occurs a schism between law and ethics. Rather than propounding a standard of moral absolutes such as naturalistic theories, voluntaristic positivism asserts that posited legal authority

⁴⁸Kooijmans, op. cit., p. 145.

⁴⁹Friedmann, op. cit., p. 76.

emanates from the will of the state, thereby negating an inquiry into universal moral norms.⁵⁰ In fact, the logical pursuit of positivist conceptions of legal equality leads to the antithesis of ethical ends. If sovereignty is considered the absolute, unrestricted authority of the state will and if, in principle, the state has complete freedom because it is not subject to any higher authority, then the rights of other states stand in danger of being infringed upon. There is a reversion of the Hobbesian idea of war of all against all because the sovereignty of one state excludes the sovereignty of others.⁵¹

In summary, the doctrine of legal equality, like its predecessor, is a myth. It stands aloof to reality. It remains isolated from political and social change; it fails to offer norms for the development of cooperation between small new nations and large powerful ones; it even fails to envisage a spirit of cooperation which might enable the realization of state equality. It worships the sovereign will of the state at the expense of propounding a merger of reality and broad ethical ends for the growth of a world society.

⁵⁰Friedmann, op. cit., p. 76.

⁵¹Kooijmans, op. cit., pp. 128-129.

CHAPTER IV

THE NEW NATIONS AND THE DOCTRINE

Since the beginning of the twentieth century, over sixty nations have come into existence.¹ Most of these new nations are small, weak, and were, in most cases, former dependencies. Recognizing all too well the divergence of political power and economic development between themselves and the rest of the world, they invoke the doctrine of state equality as a rationale for their efforts to diminish these inequalities. One means by which they hope to obtain greater equality with the Western World is through the United Nations system, the primary concern of this chapter. For many new nations, admittance to the United Nations is the culmination of a victorious struggle. While independence itself testifies to the destruction of their status as an unequal in the colonial system, the guarantee of their position as an independent state and the peace required to make their independence meaningful can be found only in an international organization.²

"Admission into the United Nations," noted Rupert Emerson, "is a symbol of coming of age and of equal acceptance

¹See Appendix B.

²J. J. G. Syatauw, Some Newly Established Asian States and the Development of International Law (The Hague: Martinus Nijhoff, 1961), p. 10.

into the family of nations."³

Specifically, this chapter attempts to indicate the direct or indirect influence of the new nations' application of the doctrine in the United Nations by the following:

- (1) The membership expansion of the General Assembly and the utilization of the voting system to achieve greater representation on such committees as the General Committee and to obtain greater political maneuverability;
- (2) The expansion of geographical distribution and of the membership of the Security Council;
- (3) The broadening of the membership of the Economic and Social Council and its Committee on Non-Governmental Organizations;
- (4) The opposition of the voting system of the financial agencies;
- (5) The failure of the new nations to establish a Special United Nations Fund for Economic Development;
- (6) The establishment of the United Nations Conference on Trade and Development.

The General Assembly

As early as the San Francisco Conference, the small

³Rupert Emerson, From Empire to Nation (Cambridge: Harvard University Press, 1962), p. 3.

states campaigned to enhance the position of the General Assembly vis-a-vis the Security Council. Because of the equality of voting power within the Assembly, the Assembly, they believed, was the "primary vehicle available for the exertion of their influence upon world affairs."⁴ One Turkish delegate to the Conference asserted:

The principle of the sovereign equality of states should have as a consequence the concentration...in the hands of the Assembly of all the powers relative to decisions bearing upon the maintenance of peace and security.⁵

The decisions of the Big Five prevailed, however, and the Security Council retained the hegemony of power. Nevertheless, the small states left the Conference with the firm resolve to exploit every opportunity to increase the power of the General Assembly which they regarded as "the democratic core of the organization" and as "the great focal point from which all other United Nations bodies draw their support and to which they must all look for ultimate guidance and support."⁶

⁴Inis L. Claude, Jr., Swords into Plowshares (3rd ed., rev.; New York: Random House, 1964), p. 162.

⁵Robert M. MacIver, The Nations and the United Nations (New York: Manhattan Publishing Co., 1959), pp. 78-79.

⁶Claude, op. cit., p. 162. See also Herbert V. Evatt, The Task of Nations (New York: Duell, Sloan, and Pearce, 1949), p. 12.

One means of strengthening the "democratic core of the Organization" was through giving greater universality to Article 4, paragraph 1 of the Charter which stated that:

Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.⁷

Yet, even this strategy was aborted, at least until 1955, because of the stipulation in paragraph 2 that made the admission of any state subject to a "decision of the General Assembly upon the recommendation of the Security Council" and the resulting entanglement of state admission with the political struggle between the Soviet Union and the United States. These two powers supported or rejected states desirous of membership by determining whether or not the applicants would benefit or hinder their political positions. Beginning in 1947, the Soviet Union sponsored a series of "package proposals" whereby several states in both blocs could be admitted.⁸ The Western powers, led by the United States, prevented the approval of these proposals on the ground that each membership application had to be judged separately with reference to the criteria stated in Article 4. This position was supported by an

⁷United Nations, Charter, Art. 4, para. 1.

⁸It should be noted that in 1946 the United States admitted the first "package" proposal, but it was defeated by the Soviet Union. (Claude, op. cit., p. 83.)

advisory opinion issued by the International Court of Justice in 1948.⁹ In retaliation, the Soviet Union used its veto power in the Security Council to defeat Western supported applicants. This only served, however, to enhance Western propaganda for the Soviet Union was guilty both of sponsoring unconstitutional "package proposals" and of misusing its veto to exclude well-qualified states. For awhile, the Western strategy gained support from the smaller states of the United Nations. Since the small nations were eager to strengthen their own status in the organization, they were sensitive to the veto as a symbol of inequality. Consequently, according to Inis Claude, they were inclined to:

...deplore its use as a bar to the admission of new members, to insist that the veto was not constitutionally applicable to Security Council action on applications, and even to argue that the General Assembly was competent to admit new members whether recommendations for admission had been approved in the Security Council or not.¹⁰

Another advisory opinion by the International Court failed to endorse the attitude of the small states. It held that giving power to the General Assembly to control membership "would be to deprive the Security Council of an important power which has been intrusted to it by the

⁹Claude, op. cit., pp. 83-84. See Advisory Opinion of Conditions of Admissions of New Members to the United Nations, May 28, 1948, International Court of Justice Reports, 1948, pp. 57-66.

¹⁰Claude, op. cit., p. 84.

Charter."¹¹ Alejandro Alvarez of Chile, however, made an acute analysis of the small states' position when, in the dissent, he said:

...if it were admitted that the right of veto could be freely exercised, the result might be that a State whose request for admission had been approved by all the Members of the General Assembly would nevertheless be unable to obtain admission to the United Nations because of the opposition of a single country; a single vote would then be able to frustrate the votes of all the other Members of the United Nations -- and that would be absurd.¹²

Regardless of the Court's decision, the smaller states' struggle was significant "as a phase of their persistent effort to increase the role of the General Assembly...and thereby reduce the preponderance of the great powers in the United Nations."¹³

The small states soon became unresponsive to the American position. They realized that the obstruction to universality in the Assembly was caused more by a rejection of politically balanced group proposals rather than the vetoing of individual applications. They believed that any significant expression of membership would have to come through compromise among the large powers and because the large powers also shared this

¹¹Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, March 3, 1950. International Court of Justice Reports, 1950, pp. 4-11.

¹²Ibid., p. 11.

¹³Claude, op. cit., p. 85.

attitude, a group of sixteen applications received favorable action in the Security Council and, subsequently, were approved by the General Assembly on December 14, 1955.¹⁴ Since 1955, more nations have been admitted through group proposals and at the time of this writing the Assembly stands at 122.

Now that the General Assembly basically reflects a universality of membership, Article 18, paragraph 1, which states that "each member of the General Assembly shall have one vote" assumes great meaning.¹⁵

Most of the recent additions of the Assembly are extremely small and politically and economically weak, yet under the Charter, they have as much voting power as the large, powerful nations. Thus, for the first time, many of the new nations are given a sense of equality, though superficial, especially in light of the obvious inequalities between the large and small powers in the Security Council and in the financial agencies and of even the persuasive influence exerted by the large nations on their one vote in the Assembly. In regard to the

¹⁴Claude, op. cit., p. 85. See Appendix C.

¹⁵Complete universality still remains unrealized in view of the absence of The People's Republic of China, North and South Viet Nam, North and South Korea, and East and West Germany. While subjects of interest and ones needing more investigation, they are beyond the intention of this chapter.

Assembly, Benjamin Akzin's assertion that the "invariable objective of the individual state is to gain the maximum possible influence in the affairs of the organization..." is true, particularly for the new nations which use their equal vote as a means to press for greater representation in such committees as the Assembly's General Committee and to obtain greater political maneuverability.¹⁶ The latitude available to the new nations and their one vote is evidenced in the following statement:

...in the United Nations, where politics definitely take precedence over technical consideration, the General Assembly on which all members have one vote takes binding decisions of an organizational or procedural nature only; otherwise, it adopts mere recommendations. Nevertheless, these organizational and procedural matters include some of the greatest importance, such as admission of new members, suspension and expulsion from membership, election to various bodies, budgetary decisions, and recommendations affecting peace and security.¹⁷

In 1963, during the eighteenth session of the General Assembly, fifty-five Asian and African states indirectly invoked the doctrine of the equality of states in the formulation of Resolution 1990. This resolution outlined provisions for expanding the composition of the President of the General Assembly, thirteen Vice-Presidents

¹⁶Benjamin Akzin, New States and International Organization, A Report to the United Nations Educational, Scientific and Cultural Organization, Prepared by the International Political Science Association (Paris: UNESCO, 1955), p. 148.

¹⁷Ibid., p. 153.

and the Chairmen of the seven Main Committees.¹⁸ "Taking into account the considerable increase in the membership of the United Nations," the new nations also wanted to construct the General Committee in such a way that it "would insure its representative character on the basis of a balanced geographical distribution among its members."¹⁹ They recommended that the number of Vice-Presidents on the Committee be increased to the following pattern:

- (a) Seven representatives from Africa and Asian States;
- (b) One representative from an Eastern European State;
- (c) Three representatives from Latin American States;
- (d) Two representatives from Western European other States;
- (e) Five representatives from the permanent members of the Security Council.²⁰

The seven Chairmen of the Main Committees would be elected from a geographical pattern which would give the African and Asian states three representatives.²¹ Before voting on the resolution, several delegations made

¹⁸ Basically, the General Committee recommends a provisional agenda for General Assembly sessions. For greater detail of the Committee's function, see: United Nations, Rules of Procedure of the General Assembly, Rules 40-42.

¹⁹ United Nations, Official Records of the General Assembly, Eighteenth Session, Annexes, Vol. III, Agenda Items 81, 82, 12 (December 17, 1963), (New York, 1963), pp. 11-12.

²⁰ Ibid., p. 12.

²¹ Ibid., p. 12.

comments, all of which praised the new Afro-Asian states for their efforts to gain greater representation in the United Nations. The Soviet Union's N. T. Fedorenko said:

The inclusion of this question, put forward by a large group of African and Asian countries in the agenda of the General Assembly's eighteenth session was due to the legitimate efforts of the voting independent States of Africa and Asia to assert and consolidate their equality and sovereignty by securing an equal voice not only in the United Nations itself, but also in its main organs.²²

The General Assembly passed the resolution unanimously, 111-0-0. Of the 111 votes, 57 were from African and Asian states and this number plus the votes from the Latin American states would have been more than sufficient for the necessary two-thirds majority.²³ This in itself gives evidence of the effects which can be achieved through a unified effort to capitalize on the one nation-one vote system of the Assembly. Following the vote, B. C. Mishra of India said:

The negotiations have been successful because the African-Asian delegations were solid on this question. Their solidarity did not come out of any desire, to use a colloquialism, to gang up against other delegations of the Assembly. The solidarity was born out of a belief of the African-Asian delegations that their cause was just and that the time was ripe to remedy the situation arising out of inequitable and unbalanced representation in the principle Councils of the United Nations, and their proposals were fair and equitable to all groups.²⁴

²²United Nations, Official Records of the General Assembly, Eighteenth Session, Plenary Meetings, Vol. III, 1285 Meeting (A/PV. 1262-1285, December 17, 1963) (New York, 1963), p. 13.

²³Ibid., p. 17.

²⁴Ibid., p. 19.

The new nations also see the voting system as an opportunity to gain greater political maneuverability and in this way "compensate for some of the legal disabilities and factual advantage in which they find themselves as compared to the major Powers."²⁵ The African and Asian states hold more votes than any other grouping within the General Assembly and for questions requiring a majority vote, as indicated in Article 18, paragraph 3 of the Charter, the Afro-Asian positions, assuming there is unity within these new nations, can prevail.²⁶ Even for a two-thirds majority required for "important questions" as outlined in Article 18, paragraph 2, the Afro-Asian states can dominate Assembly decision-making provided they influence the vote of a small but necessary percentage of other nations. The large powers, particularly the two blocs represented by the Soviet Union and the United States, must obtain the support of these new nations if their resolutions are to pass. Thus, new

²⁵Akzin, op. cit., p. 154.

²⁶It should be noted that Afro-Asian nations are never completely unified on all issues. Factions occur among these nations on such subjects, for example, as deciding what measures should be implemented to stabilize the Middle East following the June, 1967, war between the Arab nations and Israel. Even among the African nations, unity is often missing. See John H. Spencer, "Africa at the U. N.: Some Observations," Independent Black Africa (Chicago: Rand McNally and Co., 1964), pp. 543-544.

nations maneuver politically between the two large blocs to achieve a marginal and vicarious power which supplements their vote and thereby decreases their political inferiority. Speaking of this political maneuvering, Benjamin Akzin said:

...most of the new States have adjusted themselves very well to the bloc pattern and have thereby minimized the threat of an unequal position to which their newness, military weakness and economic and cultural backwardness seemed to ~~destine~~ them... At times the result is that not only has equality been restored in favor of the weaker States but that the weaker States gain a predominance of influence on arithmetical grounds.²⁷

Since the "Uniting for Peace" resolution of November 3, 1950, by which the General Assembly under a two-thirds majority assumed major responsibility and can continue to do so "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security" the new nations are in a position where they can influence the direction of questions which normally are within the purview of the Security Council.²⁸

Hence, without the support of the new nations, the General Assembly's efforts to create a United Nations Emergency Force in Suez, its request for the Secretary-General to facilitate the withdrawal of foreign troops

²⁷Akzin, op. cit., p. 156.

²⁸Friedmann, op. cit., p. 53.

during the Lebanese crisis in 1958, and its creation of a Conciliation Commission, composed of Asian and African representatives, for the pacification of internal dissensions during the 1960 Congo crisis could have failed. It is no mystery, therefore, that the new states "sponsor the wider bodies such as the General Assembly in which they enjoy formal equality."²⁹

Though peripheral to the main objective of this section, the reaction by some of the larger powers to the one nation-one vote system of the Assembly so effectively utilized by the numerically preponderant new nations should be mentioned. Publicists from several Western nations, particularly Great Britain and the United States, have suggested systems of weighted voting which distribute votes on the basis of prescribed criteria.³⁰ Their contention is that the voting system "should be proportioned to real power and influence in the world, defined by some formula which would give weight, but not exclusive weight,

²⁹Akzin, op. cit., p. 154.

³⁰Examples of various systems of weighted voting can be found in the following: Grenville Clark and Louis B. Sohn, World Peace Through World Law (3rd ed, rev.; Cambridge: Harvard University Press, 1966), pp. 55-58; Korowicz, op. cit., pp. 265-266; Quincy Wright, International Law and the United Nations (London: Asia Publishing House, 1960), p. 126.

to the population factor."²⁹ Yet, as Dag Hammarskjold said:

It is sometimes said that the system of one vote for one nation...and the consequent preponderance of votes by the middle and smaller powers, damages the usefulness of the United Nations... It is certainly not a perfect system, but is there any proposal for weighted voting that would not have even greater defects?³¹

According to Wilfred Jenks, the General Assembly, as opposed to the financial specialized agencies of the United Nations system, the international commodity councils, the European Communities, and the Consultative Assembly of the Council of Europe, has a wide range of responsibilities and where this exists:

...the factors to be taken into account in assessing the relative interest of its Members either in its work as a whole or in particular decisions are likely to be too varied and imponderable and the relative weight to be attached to the different factors is likely to be the subject of acute controversy.³²

Any decision affecting the voting procedure of the General Assembly would necessitate both the concurrence of two-thirds of the members of the General Assembly and the agreement of all the permanent members of the Security Council.³³ While the small states would block any such action because of the fear that it would "destroy the belief in the equal rights of men and women and of nations large and small on which the United Nations Charter depends," it would be difficult for the five permanent

³¹Sydney D. Bailey, The General Assembly (New York: Frederick A. Praeger, 1960), p. 10.

³²Jenks, op. cit., p. 53.

³³United Nations, Charter, Art. 108.

members of the Security Council to consent unanimously to such an amendment because of the hesitancy of either the Western nations or the Soviet Union to alienate the future support of the new nations, and because of the probable lack of common agreement as to how differential voting weights should be allocated.³⁴

Security Council

The Security Council with its permanent membership prescribed explicitly by the Charter in Article 23, paragraph 1, and its non-permanent membership elected from the General Assembly "represents a striking example of a departure from literal adherence to 'sovereign equality'..."³⁵ Nevertheless the new nations realize that regardless of the privileged position of the five permanent members of the Council, they can serve as a pressure group to open the non-permanent membership to wider representation.

The Charter established two broad considerations for the General Assembly's election of the non-permanent members. First is the "contribution...to the maintenance of international peace and security and to the other

³⁴John Karefa-Smart, "Africa and the United Nations," The United Nations in the Balance, eds. Norman J. Padelford and Leland M. Goodrich (New York: Frederick A. Praeger, 1965), p. 409; Claude, op. cit., pp. 126-127.

³⁵D. W. Bowett, The Law of International Institutions (New York: Frederick A. Praeger, 1963), p. 323.

purposes of the Organization" and the second is "equitable geographical distribution."³⁶ As early as 1946, there were attempts to erect the second consideration into a rule binding on members in determining for whom their votes were to be cast. It is alleged that an unwritten, informal "gentleman's agreement" originated in London where the permanent members of the Security Council tacitly accepted the division of the world into five regions and supported a regional representation of the non-permanent seats of the Council according to the following pattern: one seat for the British Commonwealth, the Middle East, Western Europe, Eastern Europe, and two seats for Latin America.³⁷ Those states which were not parties to the 1946 agreement did not consider themselves bound by it. This was evident in the second session of the General Assembly in 1947 when the Indian representative said:

We have been told that the allocation of seats in the Security Council is based on some arrangement privately arrived at among some of the Powers. But the distribution of Council seats by secret diplomacy to which the members of the General Assembly are not a party cannot, I am sure, find any support in this august body. Without in any way desiring to offend any of the Powers concerned, the delegation of India must challenge this arrangement. Our withdrawal should

³⁶United Nations, Charter, Article 23, paragraph 1.

³⁷Donald C. Blaisdell, International Organization (New York: Ronald Press, 1966), p. 52. Also see: United Nations, Repertory of United Nations Practice, Vol. II, New York, 1955, p. 8.

not be taken to mean, nor does it imply, that we accept the so-called agreement between certain Powers for the distribution of seats.³⁸

Yet, the Afro-Asian states were not in a numerically predominant position in 1946 and were unable, consequently, to acquire any change in the geographical distribution. For the next sixteen years, the distribution of the non-permanent members accentuated the underrepresentation of the Afro-Asian nations as is shown by the accompanying table:³⁹

	<u>Seats</u>	<u>1946: Number of States</u>	<u>1962: Number of States</u>
Latin America	2	20	22
Western Europe	1	5	12
Commonwealth	1	4	4
Eastern Europe	1	7	13
Middle East (Asia, Africa)	1	10	56

In 1963, however, over thirty-two new states from Africa and Asia submitted a resolution to the eighteenth session of the General Assembly. The first section of the resolution (1991-XVIII-A) dealt with the Security Council. Recognizing that the "present composition of the Security Council is inequitable and unbalanced" and

³⁸Bailey, op. cit., p. 167.

³⁹Alf Ross, The United Nations: Peace and Progress (Totowa, New Jersey: The Bedminster Press, 1966), p. 120.

and that "the increase in the membership of the United Nations makes it necessary to enlarge the membership of the Security Council," the Afro-Asian states submitted a Charter amendment which would increase the non-permanent membership from six to ten and a proposal which would distribute the non-permanent membership according to the following pattern:

- (a) Five from the African and Asian States;
- (b) One from Eastern European States;
- (c) Two from Latin American States;
- (d) Two from Western Europe and other States.⁴⁰

The resolution passed by a vote of 97-11-4. It is interesting to note that among the fifteen nations which either voted against the measure or abstained were France, the Soviet Union, the United Kingdom, and the United States, four of the five permanent members of the Council. Nevertheless, fifty-six Afro-Asian states plus twenty Latin American states formed the necessary two-thirds majority which was buttressed by a few nations from Western and Eastern Europe. Even the four permanent members changed their position later for on August 31, 1965, the amendment was ratified.⁴¹ Thus, in light of the

⁴⁰United Nations, Official Records of the General Assembly, Eighteenth Session, Annexes, op. cit., p. 12.

⁴¹United Nations, Official Records of the General Assembly, Plenary Meetings, op. cit., p. 17.

recent increase in the Council's membership from eleven to fifteen, the Afro-Asian states now have five representatives, or one-half of the non-permanent membership.

While secondary to the primary objective of this section, the veto is mentioned only as an obvious inequality which generates different attitudes among different new states. In Benjamin Akzin's report, compiled by rapporteurs who collected data from their respective countries (India, Pakistan, Lebanon, Israel, the Phillippines, and Indonesia) on the attitudes concerning involvement in international organization and prepared for UNESCO, he noted that while there was a general feeling of disenchantment with decision-making by unanimity, there was a divergence of opinion concerning the veto in the Security Council. India's representative stated:

...while unanimous decisions on important political questions are certainly desirable, it has to be admitted that it is not in the realm of practical politics... decision by majority is the only feasible alternative unless the agreed rules of procedure provide otherwise. This view also explains India's acquiescence in the retention of the right of veto assigned to the Big Five Powers in the Security Council.⁴²

Contrary to India's position, however, the Lebanese representative believed that his country preferred the

⁴²Akzin, op. cit., p. 177.

majority principle as opposed to the veto because, for one thing, "it is still not certain that the Great Powers would not prefer to come to terms among themselves outside of the U. N. rather than use the U. N. as the instrument whereby a genuine, sovereign, international authority could be created." He recognized that any extension of the majority principle would necessitate a change in the relationship between General Assembly and Security Council, but "this change has already been initiated by the resolution 'Uniting for Peace,' and only needs to be carried to its logical conclusion."⁴³ The Pakistani investigator simply said, "The rule of Big Power unanimity in the Security Council has frustrated the working of that organ of the United Nations..."⁴⁴

In summary, regardless of the veto, which the new nations recognize will be present as long as the large powers are present, the new states take whatever measures they can as means to dispel the gap between themselves and the great powers. One realistic measure which already has proved successful was the expansion of the non-permanent membership of the Security Council.

The Economic and Social Council

Before August 31, 1965, the Economic and Social

⁴³Akzin, op. cit., p. 188.

⁴⁴Akzin, op. cit., p. 191.

Council consisted of eighteen members elected for three year terms by a two-thirds majority vote of the General Assembly. Generally, the distribution of seats was as follows:

- (a) Four from Latin America;
- (b) Four from Asia and Africa;
- (c) Three from Eastern Europe;
- (d) Five from Western, Northern and Southern Europe;
- (e) One from the older Commonwealth States;
- (f) One from the United States.⁴⁵

After the heavy influx of new nations in 1955, ECOSOC, like the General Assembly and the Security Council, became subject to the new nations' demands for a larger membership and a more equitable geographical distribution. They cared little for the provision in Article 69 of the Charter which allowed ECOSOC "to invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member." Their interest was for greater opportunity to exercise the vote since decision-making in ECOSOC is governed by simple majority and where each member has one vote.⁴⁶

The first resolution in support of an increase in

⁴⁵Bailey, op. cit., pp. 175-176.

⁴⁶Everyman's United Nations (7th ed.; New York: United Nations Office of Public Information, 1964), p. 15. For the remaining part of this chapter, the Economic and

the membership of the Council was adopted by the Council in July, 1958, and by the Assembly during the thirteenth and fourteenth sessions. The resolution failed to become an amendment to the Charter, however, because of the Soviet Union's opposition.⁴⁷

On December 17, 1963, Resolution 1991 came before the eighteenth session of the General Assembly. The second section of the resolution, the first section was discussed earlier in reference to the Security Council, proposed the expansion of ECOSOC's membership from eighteen to twenty-seven with the additional membership distribution according to the following pattern:

- (a) Seven from African and Asian States;
- (b) One from Latin American States;
- (c) One from Western European and other States.⁴⁸

Ethiopia's Tesfaye Gebre-Egzy's comment was significant in that it indicated the role which the Afro-Asian nations played in the formulation of the resolution:

Social Council shall be designated as ECOSOC.

⁴⁷Bailey, op. cit., p. 176. The Soviet Union, at least until the adoption of Resolution 1991-XVIII (the expansion of the Security Council and ECOSOC) in 1963 opposed any increase in the U. N. organ, not because of the merit of the proposals, but because it was a protest for the absence of The People's Republic of China. (Bailey, op. cit., p. 176.)

⁴⁸United Nations, Official Records of the General Assembly, Eighteenth Session, Annexes, op. cit., p. 13.

I am bound to say that the preparation of the two draft resolutions now before the Assembly has taken a long time. I think it is no secret that the thirty-two African States have had a great deal to do with preparation of these...resolutions.⁴⁹

The resolution was adopted by 97-11-4, with fifty-eight affirmative votes from the new Afro-Asian nations and twenty affirmative votes from Latin America. By August 31, 1965, the necessary two-thirds majority, including all the permanent members of the Security Council, had approved the amendment with the result that by January, 1965, ECOSOC's membership stood at twenty-seven of which seven were from Afro-Asia.⁵⁰

The latest move registered by the Afro-Asian states in their consistent struggle for greater equality came on March 4, 1966, when, during the fortieth session of ECOSOC, resolution 1099 (XL) concerning the enlargement of the Committee on Non-Governmental Organizations was presented.⁵¹ The resolution was formulated with the idea that since ECOSOC's membership had expanded, it was necessary to increase the Committee on Non-Governmental Organizations

⁴⁹United Nations, Official Records of the General Assembly, Eighteenth Session, Plenary Meeting, op. cit., p. 16.

⁵⁰United Nations, Annual Report of the Secretary-General on the Work of the Organization, Twenty-first Session, Supplement No. 1, (A/6301), (New York, 1965), p. 154.

⁵¹The Committee on Non-Governmental Organizations advises ECOSOC on which non-governmental organizations are to be given consultative status. (Everyman's United Nations, op. cit., p. 17.)

from seven to thirteen and to distribute the proposed membership on the following basis:

- (a) Five members from Afro-Asian States;
- (b) Four members from Western European and other States;
- (c) Two members from Latin American States;
- (d) Two members from Socialist States of Eastern Europe.

After little debate, the resolution was adopted by 22-1-4.⁵²

Specialized Agencies (Financial Agencies)

This section concentrates only on the financial agencies of the United Nations since they are governed by a system of weighted voting which placed the now under-developed nations in an inferior voting position as compared with the large industrialized nations. Even this discussion of the new nations and the financial agencies is broad, although it is narrowed and treated in a more detailed manner in the section on the Special United Nations Fund for Economic Development.

The first international organization created with the main purpose of "making available world-wide loans to Governments and, under governmental guarantee, to

⁵²United Nations, Official Records of the Economic and Social Council, Fortieth Session, Supplement No. 1 (E/4176), p. 7.

private persons such as to business, industrial and agricultural enterprises in the territories of its member States" was the International Bank for Reconstruction and Development.⁵³ It was established during the Bretton Woods Conference of 1944 to meet international financial problems that were envisaged for the postwar period.⁵⁴ Even at the Bretton Woods Conference, the underdeveloped nations, represented by the Latin American countries, were skeptical about the Bank since they "were afraid that the Bank would allocate too large a share of its resources to reconstruction and that not enough would be left for development."⁵⁵ Thus, they proposed that the Bank should allocate equal amounts for development and reconstruction, and although this proposal was defeated on the grounds that equal allotments for both areas would leave insufficient funds for development loans after the reconstruction was completed, the underdeveloped states at least succeeded in adding the word "development" to the name of the Bank and included in the Article of Argument

⁵³Uner Kirdar, The Structure of the United Nations Economic Aid to Underdeveloped Countries (The Hague: Martinus Nijhoff, 1966), pp. 103-104.

⁵⁴Wolfgang G. Friedmann, George Kalmanoff, Robert F. Meagher, International Financial Aid (New York: Columbia University Press, 1966), p. 90.

⁵⁵Kirdar, op. cit., p. 103.

the following provision:

The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects for development and projects for reconstruction alike.⁵⁶

Yet, the underdeveloped nations' greatest skepticism concerning the Bank, the International Monetary Fund (IMF) also established at the Bretton Woods Conference for the purpose of financing temporary balance-of-payments deficits, and the International Finance Corporation (IFC) created in July, 1956, as an affiliate of the World Bank to "further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas," is their system of weighted voting.⁵⁷ The Bank and the IMF operate on the same voting scale: each member of the governing board, designated as the Board of Governors both in the Bank and the IMF, has 250 votes plus an additional vote for each additional share of stock equivalent to \$1,000.⁵⁸

The new nations, while members of each, feel that the system of weighted voting is weighted in favor of the Western industrial nations. This contention is verified

⁵⁶Kirdar, op. cit., p. 103.

⁵⁷Kirdar, op. cit., p. 144; also, for the text of the Articles of Agreement of the International Finance Corporation, see: United Nations Treaty Series, Vol. 264.

⁵⁸Kirdar, op. cit., pp. 107, 144, and 180.

by the following table:⁵⁹

World Bank Subscriptions and Voting Shares of Six
Largest Contributors
(Percent)

	Share of Total Capital Subscribed	Share of Total Votes
United States	28.07	25.25
United Kingdom	11.49	10.40
West Germany	5.66	5.17
France	4.64	4.26
India	3.54	3.27
Canada	3.50	3.23
Total	56.90	52.58

Their argument is further substantiated by the fact that five of the eighteen Executive Directors responsible for the conduct of the general operations of the Bank and the exercise of all the powers delegated to them by the Board of Governors, are appointed by the five largest stockholders.⁶⁰

The IMF, with the largest voting power belonging to the United States (51,850 votes, 23.82% of the total voting power) and the second, third, and fourth largest voting powers belonging to the United Kingdom, France, and Germany, respectively, and the IFC, with the United States, the United Kingdom, and France, also indicates

⁵⁹International Bank for Reconstruction and Development, Statement of Subscription to Capital Stock and Voting Power, Bank Press Release No. 67/21 (March 31, 1967), Appendix C, p. 7. In 1967, the Bank had a total of 105 members. (Ibid.)

⁶⁰Kirdar, op. cit., p. 109.

the predominant voting power of the Western nations.⁶¹

As Benjamin Akzin said:

...the position of members of the International Bank for Reconstruction and Development and of the International Monetary Fund resembles that of stockholders in a joint stock company more than that of members in an ordinary intergovernmental organization.⁶²

Though not related directly to the voting system, the economic practices of the IMF are viewed as "hardfisted" and "orthodox" by many of the new nations. The IMF, as a pool of money contributed according to agreed quotas by each member with 25 percent of the quota paid in gold and the remainder in the country's own currency, "binds its members not to alter the exchange rates more than 10 percent from the initial par value without the Fund's permission." Permission requires a majority vote, but these votes, as already indicated, are weighted so that in fact, permission "means the consent of countries that have the major financial stake in the Fund."⁶³ The Bank's system of "hard loans," a high interest rate (6%)

⁶¹International Monetary Fund, Executive Directors and Voting Power, Annual Report, 1966, Appendix 1, p. 155. Total membership of the IMF in 1966 was 103. (Ibid., p. 33.) International Finance Corporation, Statement of Subscriptions to Capital Stock and Voting Power, Annual Report, 1965-1966, Appendix E, p. 444. In 1966, the IFC's total membership was 81. (Ibid.)

⁶²Akzin, op. cit., p. 148.

⁶³Philip E. Jacob and Alexine L. Atherton, The Dynamics of International Organization (Homewood, Illinois: The Dorsey Press, 1966), pp. 380 and 456.

with a maximum term of twenty-five years, is also disliked by many of the new states. The new nations have done nothing to change the weighted voting within the agencies, although they were instrumental in creating what they considered a more equitable structure for development financing, the International Development Association (IDA).⁶⁴ While retaining weighted voting, 500 votes per member plus one additional vote for each \$5,000 of its subscription, the IDA was a reaction to the World Bank's "hard loans."⁶⁵ The IDA charges no interest rates, only a service charge to defray administrative expenses, and uniformly grants a repayment period of fifty years, including an initial grace period of ten years.⁶⁶

The voting system weighted heavily for the Western countries remains as an example of inequality to the new nations. Yet, these agencies have contributed much of their reserves to these developing nations. Thus, rather

⁶⁴Ray Blough, "The Furtherance of Economic Development," The United Nations in the Balance, eds. Norman J. Padelford and Leland M. Goodrich (New York: Frederick A. Praeger, 1965), p. 208.

⁶⁵Kirdar, op. cit., p. 262.

⁶⁶Friedmann, Kalmanoff, and Meagher, op. cit. pp. 104-105.

than invoke the doctrine of state equality at the expense of alienating their benefactors, the new nations, as Inis Claude has indicated, "subordinate their urge for formal equality to the desire for international aid."⁶⁷ They had learned earlier in their experience with the attempt to establish a Special United Nations Fund for Economic Development (SUNFED) that a dogmatic appeal to the doctrine could stifle the realization of their objectives.

Special United Nations Fund
For Economic Development

What the new nations desire is an agency which combines low interest loans and a system governed by equal voting. Despite the modest success of the Point Four Program established by the United States in 1949 as a "bold new program" of technical assistance to developing areas and the Expanded Program of Technical Assistance established by the United Nations in 1949 to provide these areas with "experts, fellowships, supplies, and equipment," the developing areas insistently pushed for a larger United Nations' undertaking, backed by the United States and other advanced countries, to finance their economic development.⁶⁸ The European

⁶⁷Claude, op. cit., p. 127.

⁶⁸Robert E. Elder and Forrest D. Murden, Economic Cooperation: Special United Nations Fund for Economic Development (Woodrow Wilson Foundation: Seminars on the United Nations, No. 2; New York: Woodrow Wilson Foundation,

Cooperation Administration and the Marshall Plan, both created by the United States, lent credence to their argument that, on the one hand, the United States could do more to aid the less developed countries and that, on the other hand, these programs were examples of "economic discrimination" against them. The technical assistance programs, they believed, could yield only limited results unless backed by substantial investment. Thus, from a desire to obtain greater international and even more bilateral and multilateral support for their economic development, and from a disgust with the "hard loan" policy of the World Bank which was made more oppressive by the Bank's system of weighted voting, the developing nations pressed for the creation of SUNFED, an agency which would make grants and "soft loans" (long-term and low-interest) on a large scale and which would be controlled by an organizational structure where each nation has only one vote.⁶⁹

As early as 1949, the developing nations began the movement in ECOSOC and the General Assembly for the establishment of a U. N. capital development fund to be used for financing economic development.⁷⁰ The most

1954), p. 4.; I.M.D. Little and J.M. Clifford, International Aid (Chicago: Aldine Publishing Co., 1966), p. 25.

⁶⁹Blough, op. cit., p. 207; Elder, op. cit., p. 5. Little, op. cit., p. 47.

⁷⁰Blough, op. cit., p. 207. For details of the

concerted efforts, however, were made at the fifth session of the General Assembly in 1950 where a unanimously adopted resolution called on ECOSOC to study plans for "an increased flow of international public funds" to the developing areas and to submit recommendations to the sixth session of the Assembly.⁷¹

The thirteenth session of ECOSOC (1951) was the scene of the first obvious cleavage between the developed and the developing nations. While the developing nations argued for a development fund which would channel economic aid from the advanced nations through an international agency, the developed nations endeavored to:

...focus attention on measures to increase the international flow of private rather than public capital, and of expanding the lending operations of the public institutions already in existence - the United States Export-Import Bank and the International Bank for Reconstruction and Development.⁷²

Since the Council at the time was divided almost equally between the developed and developing nations, the resolution sponsored by Chile, Pakistan, and the Philippines, and India to establish a new development fund was defeated (10

first proposals, particularly those of India's R. K. V. Rao, see: Elder, op. cit., p. 6; John G. Hadwen and Johan Kaufmann, How United Nations Decisions Are Made (Leyden, Netherlands: A.W. Sythoff, 1961), pp. 85-86.

⁷¹Hadwen and Kaufmann, op. cit., p. 87.

⁷²Elder, op. cit., p. 5.

votes to 1, with 7 abstentions). The resolution was finally adopted by a vote of 14-0-4 and dealt at length with various aspects of financial economic development and stated that ECOSOC neither accepted nor rejected the principle of the establishment of a special international fund.⁷³

The discussion of a development fund at the sixth session of the General Assembly was similar to the one during the thirteenth ECOSOC session. Again, a number of developing nations sponsored a resolution which urged the creation of a special fund designated then as the International Development Authority and again the developed nations opposed the plan. Part A of the resolution finally adopted by 30-16-11, with most of the developed nations voting negatively, concerned grant assistance and requested ECOSOC "to submit to the General Assembly at its seventh regular session a detailed plan for establishing, as soon as circumstances permit, a special fund for grants-in-aid and low-interest, long-term loans to underdeveloped countries..."⁷⁴

In response to the resolution on the sixth General Assembly session, ECOSOC established the Committee of Nine composed of four developed nations, Belgium, Denmark, the United Kingdom, and the United States, and five developing countries, Pakistan, the Philippines, Chile,

⁷³Hadwen and Kaufmann, op. cit., p. 88.

⁷⁴Hadwen and Kaufmann, op. cit., p. 89.

Yugoslavia, and Mexico. The seventh General Assembly session requested the Committee to present a "detailed plan" the following session bearing in mind that "...it is necessary to immediately give special attention to the problem of international financing of economic and social development..."⁷⁵ The Committee began its work on January 21, 1953, and met for seven continuous weeks until its unanimous report was submitted in March. It proposed the creation of a Special United Nations Fund for Economic Development and its initials of the title, SUNFED, became widely used from this date onwards to describe the idea of a large-scale U. N. capital aid fund.⁷⁶ The plan submitted was detailed as requested; however, this chapter deals only with the proposed structure and administration of SUNFED. The Committee recommended that in order "to provide immediate government control," a General Council of the Fund would meet annually. The General Council, in time, would "elect eight to twelve governments to constitute an Executive Board." As far as the Board's composition was concerned, the Committee recommended the following:

There should be equal representation on the Executive Board of the major contributors to the Fund, on the one hand, and of the other members,

⁷⁵Elder, op. cit., p. 9.

⁷⁶Hadwen and Kaufmann, op. cit., p. 90.

regard being had to the need for a reasonable distribution among these latter members of the Board.⁷⁷

The Executive Board would appoint a Director-General after consulting with the Secretary-General of the United Nations. While speaking of the responsibility of the Director-General to cast a vote in the event of a tie, the Committee also stressed that:

No mechanism of weighted voting should operate in the Executive Board. We feel that every effort should be made to achieve unanimous agreement; however, if division should occur, decisions should be taken by a simple majority vote. No Director shall participate in, or be present during a vote on an application by his own government.⁷⁸

The sixteenth session of ECOSOC received the report, but the United States diverted the attention from the report by making a proposal to use a substantial percentage of the savings derived from internationally supervised disarmament in a fund designed for financial assistance to developing countries. The Council, as a result, limited itself to simply forwarding the report to the eighth session of the General Assembly without adding any comments.⁷⁹

The eighth General Assembly proposed two plans:
(1) to ask member governments to appraise the report of

⁷⁷United Nations, Report on the Special United Nations Fund for Economic Development, Submitted by a Committee appointed by the Secretary-General, (E/2381, March 18, 1953) (New York, 1953), p. 35.

⁷⁸Ibid., pp. 35-36.

⁷⁹Hadwen and Kaufmann, op. cit., p. 90.

the Committee of Nine and to ask Mr. Raymond Scheyven of Belgium to examine the comments, to consult with the governments, and to report the results to ECOSOC and the General Assembly, (2) to investigate the possibilities of establishing an economic development fund derived from the savings resulting from disarmament.⁸⁰

During the deliberation of the General Assembly, opposition to the proposed international fund was adamant, particularly among most of the American business community and national business organizations such as the Chamber of Commerce and the National Association of Manufacturers. In Nation's Business was an article entitled "SUNFED - Your Name on a Blank Check" with a sub-title: "Taxpayers are on the spot again as the new international aid scheme raises false hopes among the foreign nations."⁸¹ The substance of the article concentrated on the equal voting power of the contributors and the recipients which, it asserted, would mean that "the borrowers would run the bank." As Robert Elder indicated:

The political significance of the problem to the United States, however, was recognized by the author, for he pointed out that, in view of the numerical majority of the underdeveloped countries, "passage of SUNFED could have serious political consequences for the United States throughout the world as angry

⁸⁰Hadwen and Kaufmann, op. cit., p. 90.

⁸¹Henry La Cossett, "SUNFED - Your Name on a Blank Check," Nation's Business, October, 1953, as quoted in Elder, op. cit., p. 14.

criticism of our attitude increases in the bloc of malcontent countries.⁸²

Raymond Scheyven's report confirmed the attitude which had been expressed in the Committee of Nine. He noted that the debate in ECOSOC and the General Assembly brought out a moral imperative for the "wealthier countries to come to the help of the poorer countries."⁸³ He also spoke of the Bank's role in the financing of investment by quoting the Bank's President who, when speaking before the General Assembly on December 10, 1951, admitted the Bank's limitations in the financing of the development of the underdeveloped areas and stated that "any additional assistance to those countries should be in the form of grants rather than quasi-loans..."⁸⁴ Summarizing the attitude of the industrialized nations toward the creation of a development fund, Scheyven said they believed:

...that contributing countries should be able to pass on questions of principle, and to express their views on the distribution of reserves, with a weight corresponding to the size of their contribution; that if they are not given some guarantee of this kind, contributing countries may well rapidly lose interest in the Fund.⁸⁵

⁸²Elder, op. cit., p. 14.

⁸³United Nations, Special United Nations Fund for Economic Development, Final Report by Mr. Raymond Scheyven, prepared in pursuance of General Assembly resolution 724 B (VIII), General Assembly, Official Records, Ninth Session, Supplement No. 19 (A/2728) (New York, 1954), p. 4.

⁸⁴Ibid., p. 10.

⁸⁵Ibid., p. 19.

After receiving the Scheyven Report, ECOSOC adopted a resolution which recommended that the next General Assembly session urge governments to review their positions with respect to establishing a special fund and that it extend Mr. Scheyven's appointment.⁸⁶

The ninth General Assembly accepted ECOSOC's recommendation and asked Scheyven to prepare an additional report to be prepared by an ad hoc committee of experts representing their respective nations, Chile, Egypt, France, India, the Netherlands, the United States, and Yugoslavia.⁸⁷ The Committee of Experts' report was presented before the twentieth session of ECOSOC and the tenth session of the General Assembly in 1955. Basically, it followed the same reasoning as the report issued by the Committee of Nine. It asserted the principle of equal representation of contributors and recipients on the Executive Board. The report stated "that this recommendation should be adopted, despite the comment on this question by a number of developed countries which would assure them a preponderant influence."⁸⁸

The tenth session of the General Assembly was convened in a "general atmosphere of optimism." The

⁸⁶Hadwen and Kaufmann, op. cit., p. 93.

⁸⁷United Nations, Special United Nations Fund for Economic Development, Official Records, Tenth Session, Supplement No. 17 (A/2906), (New York, 1955), p. v.

⁸⁸Ibid., p. 15.

developing nations believed that the drafting of a statute for a large U. N. special fund should no longer be delayed, but the optimistic spirit of the new nations was stymied by the resistance of the developed nations. The compromise resulted in the creation of another ad hoc committee composed this time of government representatives who were to analyze the comments which governments were to give in reply to a specific questionnaire. From May 7 to June 6, 1956, and from March 11-12, 1957, the Ad Hoc Committee prepared its report which, after completion, contained forty-six written statements, later increased to fifty-seven. Of special importance to this study, however, was the attitude of about fifty nations in regard to the structure of the fund. The report stated that most governments "which deal with general principles stress three, namely: the principle of universality and equality of member nations, avoidance of a new bureaucracy, and flexibility of administration."⁸⁹

The cycle of frustration was again repeated at ECOSOC's twenty-second session where the usual pressure for the drafting of statutes was deferred by the reactionary pressure of the developed nations. The inevitable compromise was a resolution that urged governments which

⁸⁹United Nations, Final Report of the Ad Hoc Committee on the Question of the Establishment of a Special United Nations Fund for Economic Development, Official Records, Twelfth Session, Annexes, Agenda Item 28 (A/3579 and Add. I), (New York, 1957), p. 25.

had not submitted their written views to the Ad Hoc Committee to do so as soon as possible.⁹⁰

The eleventh session of the General Assembly in 1956 did little except repeat the cycle of the request for statutes from the developing nations, the opposition from the developed nations, and a compromise resolution which requested the Ad Hoc Committee to indicate "the different forms of legal framework on which a Special United Nations Fund for Economic Development may be established and Statutes drafted."⁹¹

After six years, SUNFED was still a plan championed by the new nations and opposed by the developed nations. As time passed, the proponents and the opposition of the Fund became more rigid until a stalemate was reached in the twenty-fourth session of ECOSOC, in 1957. After hearing the final and supplementary report of the Ad Hoc Committee which had presented alternate systems in the creation of a special fund, the SUNFED supporters pressed for the adoption of a resolution urging the General Assembly to take steps leading to the immediate establishment of the fund. The resolution was adopted 15-3-0, the United States, the United Kingdom, and Canada dissenting.⁹² The result, however, was far from

⁹⁰Hadwen and Kaufmann, op. cit., p. 93.

⁹¹Hadwen and Kaufmann, op. cit., p. 93.

⁹²Hadwen and Kaufmann, op. cit., p. 95.

favorable. As John Hadwen said:

Neither the "victors" nor the "losers" were happy about the result. An open decision had emerged on this subject, a situation that had been averted since the split vote at the 6th General Assembly session in 1951. A reconsideration of the issue was therefore required if similar decisions at the 12th General Assembly session were to be avoided.⁹³

The basis for a reconsideration came remarkably soon, namely the twelfth session of the General Assembly (1957). Shortly before the session, the United States was known to favor the creation of a small U. N. fund, called a "Special Projects Fund," which could sponsor projects that could not be financed by the Expanded Program of Technical Assistance. On November 18, 1957, the United States presented its proposed fund in the form of a resolution. It was tabled for later discussion. Ironically, about this same time, eleven proponents of SUNFED proposed a plan which differed somewhat from the traditional approach. The primary difference concerned the voting procedure within the Executive Board. Rather than a single majority vote which had been advocated earlier by the Committee of Nine, the eleven nation resolution proposed a qualified majority vote, either two-thirds or three-quarters. This new voting arrangement was designed to prevent major contributing countries from being outvoted by the recipient nations. Even the name of their proposed fund was changed from SUNFED to EDF

⁹³Hadwen and Kaufmann, op. cit., p. 95.

(Economic Development Fund). Yet, few of the EDF supporters were "prepared to insist on their proposal to the extent of refusing that sponsored by the United States, which promised at least some increase in the total volume of U. N. economic aid." Thus, a compromise resolution, introduced by the eleven nations plus the United States, Canada, and France was adopted. It was to establish a Special Fund as an expansion of the U. N.'s technical assistance programs and the projects sponsored by the specialized agencies by creating a Preparatory Committee of sixteen countries, composed of six Western nations, the Soviet Union and Yugoslavia, three Latin American nations, and five Afro-Asian nations, to draft rules governing the fund. The resolution was adopted with the result that during the twenty-sixth session of ECOSOC and the thirteenth session of the General Assembly, the Preparatory Committee presented its suggestions including the following: (1) equal representation on the Governing Council of economically more developed nations and less developed nations; (2) a two-thirds majority rule for the decisions of the Governing Council on important questions. The suggestions were accepted unanimously. The Council and the Assembly later adopted a resolution embodying these suggestions, thereby establishing the Special Fund which was to begin functioning

on January 1, 1959.⁹⁴

In summary, the new nations failed to achieve their original aspirations for SUNFED primarily because of their insistence on sovereign equality within the proposed structure of the fund. Yet, not desiring to lose economic assistance from the major contributing nations, the new nations compromised their original position in order to remain on the receiving end of the Western aid. Thus, the failure of SUNFED proved Inis Claude's assertion noted earlier in the chapter:

...the Western powers - particularly the United States - have a persuasive instrument in their capacity to grant or to withhold the financial resources required for support of United Nations programs of assistance to developing states. The record shows that in several instances the urge for formal equality has been subordinated to the desire for international aid.⁹⁵

The United Nations Conference
On Trade and Development

Another aspiration of the new nations is to overcome what Raúl Prebisch, the Secretary-General of the United Nations Conference of Trade and Development (UNCTAD) has termed the "trade gap," or the economic inverse proportion in which the prices of Western manufactured goods

⁹⁴Hadwen and Kaufmann, op. cit., pp. 95-99; 131-132. Proposals for a U.N. capital development fund, similar to SUNFED, are still made. For a general discussion of those efforts, see: Blaisdell, op. cit., p. 159.

⁹⁵Claude, op. cit., p. 127.

needed by the developing nations increase while the financial returns of the developing nations' exportation of primary goods decrease.⁹⁶ Only by overcoming this "trade gap" can the new nations ever hope to gain a semblance of economic equality with the West. Yet, since the new nations believe that existing trade agreements are influenced largely by Western nations and make only token contributions to areas of underdevelopment, they urge the creation of institutions which are not only sensitive to the needs of the developing nations, but which are governed by equal voting.

Because the General Agreement of Tariffs and Trade (GATT) exemplified, according to the developing nations, a trend in the "existing principles and patterns of world trade" which "favour the advanced parts of the world," and because GATT's Program of Action designed to reduce or eliminate trade restrictions on products from the developing nations failed to achieve its objectives, the developing nations pressed for the convening of a United Nations conference on trade.⁹⁷ This action, however, was

⁹⁶See Raul Prebisch, "Conference on Trade and Development Concludes at Geneva," United Nations Monthly Chronicle, I (July, 1964), p. 50. For an analyzation of the "trade gap," see: Richard N. Gardner, "GATT and the UNCTAD," International Organization, Vol. XVIII (Autumn, 1964), pp. 696-698.

⁹⁷United Nations, Official Records of the General Assembly, Eighteenth Session, Supplement No. 5 (A/5514), (New York, 1963), p. 24; Blough, op. cit., p. 211.

the culmination of a long series of similar efforts, although the examination of these earlier efforts is not within the purview of this chapter.⁹⁸

Following the thirty-fourth session of ECOSOC in 1962 which, after "bearing in mind the vital importance of the rapid growth of exports and export earnings of developing countries, of primary products and manufacture, for promoting their economic development," resolved to convene a United Nations Conference for Economic Development and establish a preparatory committee of experts to consider agenda topics, the seventeenth General Assembly session recommended that the Conference convene as soon as possible. The next session of ECOSOC enlarged the

Harry G. Johnson noted that while GATT's multi-lateral bargaining gives "the smaller nations more effective participation in the negotiation of tariff reductions, the reciprocity principle in particular ensures that the bargaining will be dominated by the larger developed countries. Harry G. Johnson, Economic Policies Toward Less Developed Countries (Washington, D.C.: The Brookings Institute, 1967), p. 16. Speaking on behalf of the developing nations following the ratifications of the Kennedy Round tariff-cutting agreements in June, 1967, Peruvian Ambassador Jose Antonio Esninas said: "The developing countries deeply regret that they are not in a position to share, to the same extent, the satisfaction of the developed countries at the conclusion and the achievements of the Kennedy Round." (The Denver Post, June 30, 1967, p. 1.)

⁹⁸For a good rendition of the earlier attempts to establish conferences on trade, see: Blough, op. cit., pp. 209-212; United Nations, Proceedings of the United Nations Conference on Trade and Development, Final Act and Report (E/CONF. 46/141, Vol. I, 23 March - 16 June, 1964), (Geneva, 1964), p. 101.

Preparatory Committee to thirty and again, on a recommendation of the Committee itself, during its thirty-fifth session in April, 1963, to thirty-three countries. The Committee's enlarged membership included thirteen Afro-Asian states, four Eastern European states, six Latin American states, and nine Western states. During the second of the three meetings of the Committee, a joint statement was submitted by seventy-six developing nations indicating strong support for the proposed UNCTAD.⁹⁹ It stated that "what the world lacks today is, therefore, not the awareness of the problem (the 'trade gap'), but the readiness to act."¹⁰⁰

During the thirty-sixth session of ECOSOC, the Council noted the wide interest expressed in the proposed conference and, therefore, decided that the Conference should be held in Geneva from March 23 to June 15, 1964. The Council also approved the provisional agenda outlined by the Preparatory Committee. The importance of the joint statement submitted by the seventy-six developing nations was acknowledged during the eighteenth General Assembly session and, after receiving the reports of the Preparatory Committee and of ECOSOC, annexed the

⁹⁹United Nations, Proceedings of the United Nations Conference on Trade and Development, op. cit., p. 102.

¹⁰⁰United Nations, Official Records, Eighteenth Session, Supplement No. 5, op. cit., p. 24.

the Joint Declaration to a resolution which stated that "the purposes of the forthcoming United Nations Conference on Trade and Development are gaining strong support."¹⁰¹

On March 23, 1964, UNCTAD convened in Geneva. It was the largest trade conference ever held, assembling over 2,000 delegates from 120 countries and the Vatican.¹⁰² The Cameroon's Ahidjo expressed well the sentiment of the new nations meeting in Geneva when he said:

We firmly believe it was time that the two worlds, on one hand, countries with an embarrassing surplus of foodstuffs and capital for which unable to find appropriate use at home, and on the other, countries suffering hunger, poverty, ignorance; in short, underdevelopment should hold reasoned discussion.¹⁰³

The work of the Conference was organized into five committees designed to cover five areas, only one of which, institutional arrangements, is considered in this section. The committee system proved unweildly, however, and the bulk of the work had to be done by special working parties and conciliation groups because of the insistence of the seventy-seven developing countries, which possessed a clear majority, determined to present a united front.¹⁰⁴

¹⁰¹United Nations, Proceedings of the United Nations Conference on Trade and Development, op. cit., p. 103.

¹⁰²Johnson, op. cit., p. 33.

¹⁰³United Nations, Proceedings of the United Nations Conference on Trade and Development, op. cit., p. 86.

¹⁰⁴These other areas included international commodity problems, trade in semimanufactured and manufactured goods, the financing of development, and expansion of

In fact, according to a joint declaration issued by the developing nations toward the end of the Conference, the developing nations regarded their own unity "as the outstanding feature of the Conference."¹⁰⁵ Nevertheless, the economically advanced countries observed this unity as a threat to their position since the one nation-one vote system of the Conference placed them in a very distinct minority. The cleavage was obvious and the only way to prevent aborting the Conference was through a different process of decision-making. Under the leadership of Raúl Prebisch, the focus of the Conference turned to "working out through conciliation...forms of wording that were limited to stating the issues and the possible lines of action in a way that some or most of the developed countries from which concessions were demanded could accept."¹⁰⁶ After all, as the delegate from the Philippines said:

It is an obvious fact that on the basis of single majority the developing nations can out-vote the developed nations at any time. Yet what will it avail... to reach decisions by simple majority if the defeated minority includes the very countries from whom concessions are expected.¹⁰⁷

In some cases, the developing states disregarded the conciliatory processes and, by simple majority, passed

international trade and its significance for economic development. (Johnson, op. cit., pp. 33-34.)

¹⁰⁵United Nations, Proceedings, op. cit., p. 67.

¹⁰⁶Johnson, op. cit., p. 34.

proposals such as the first General Principle which stated that "economic relations between countries, including trade relations, shall be based on respect for the principle of sovereign equality of States, self-determination of peoples, and non-interference in the internal affairs of other countries." General Principle One was adopted by 113-1-2, with the United States voting against the measure and Portugal and the United Kingdom abstaining.¹⁰⁸

In the majority of the important issues, however, conciliation was the only means for achieving solutions. This was most evident in the debate on the form of institutional arrangements necessary for the "continuing machinery" of UNCTAD. Although it was decided to establish a fifty-five member Trade and Development Board composed of twenty-two Afro-Asian states, eighteen Western states, nine Latin American states, and six Eastern European states as a permanent organ of the Conference and as an affiliate of the "United Nations machinery in the economic field," the major contention centered on the operational and voting procedures within the Board. The developing nations wanted a one nation-one vote system which would be used in determining policy by a simple

¹⁰⁷Gardner, op. cit., p. 703.

¹⁰⁸It is interesting to note that on some occasions, the developing nations were joined by the Communist bloc, while the developed nations split in that the Common Market countries, with the exception of West Germany, abstained as did Japan and the European Free Trade Association other than the United Kingdom, and the United States voted negatively. (Johnson, op. cit., p. 37.)

majority. They spoke in a united voice when they said: "The developing nations attach cardinal importance to democratic procedures which afford no position of privilege in the economic and financial, no less than in the political sphere."¹⁰⁹ The developed nations, on the other hand, denied procedural arrangements which would capitalize on conciliatory processes so as to protect their own economic interests.¹¹⁰

A compromise was adopted. The job of working out voting procedures was left to a special committee appointed by the Secretary-General. This committee was asked to:

prepare proposals for procedures, within the continuing machinery designed to establish a process of conciliation to take place before voting and to provide an adequate basis for the adoption of recommendations with regard to proposals of a specific nature for action substantially affecting the economic or financial interests of particular countries...¹¹¹

This action echoed the activities of the SUNFED cycle -- the desires of the new nations, the reaction of the developed nations, and the resulting compromise. The Special Committee established by UNCTAD was, as Philip Jacob said, "a far cry from the glowing expectations of the have-nots when they entered the Conference."¹¹²

¹⁰⁹United Nations, Proceedings, op. cit., p. 67.

¹¹⁰Gardner, op. cit., pp. 702-703.

¹¹¹United Nations, Proceedings, op. cit., p. 60.

¹¹²Jacob and Atherton, op. cit., p. 460.

Nevertheless, the formulation of a new agency by which the developing nations can aid in the eradication, insofar as it is possible, of economic vassalage and the placing of economic interdependence on a level of equality has been constructed -- even if the new nations' urge for formal equality has been subordinated to the desire for international aid. As Harlan Cleveland said to ECOSOC in the wake of UNCTAD:

It would be bad for the developing countries, and bad for international cooperation, if the peoples and parliaments of the developed nations came to believe that recommendations on trade and development matters bearing the U.N. trademark had been produced by an automatic majority of 75. It would be far better if people in both developed and developing countries came to believe that the U.N. stands for procedures that force both groups to study their common problems in depth and open their minds to the processes of mutual persuasion.¹¹³

Summary

The new nations directly or indirectly invoked the doctrine of equality of states as a rationale behind their efforts to affect changes in the structure of the United Nations. Because their representation had increased in the General Assembly, the new nations successfully campaigned to increase the General Committee's membership on a wider and more equitable geographical basis. Using the same reasoning, the new nations, though conscious of the privileged position of the five permanent members

¹¹³Gardner, op. cit., p. 704.

of the Council prescribed by the Charter, played a dominant role in the expansion of the non-permanent membership of the Council from six to ten and in the distribution of the increased membership on a more equitable scale. The membership of the Social and Economic Council and its Committee on Non-Governmental Organizations also accommodated the new nations' demands for greater representation. ECOSOC's membership was increased from eighteen to twenty-seven and the Committee on Non-Governmental Organizations' membership was increased from seven to thirteen.

Yet, the doctrine failed to achieve the results desired by the new nations in their efforts to reform the voting procedures in the financial agencies. Though opposed to the agencies' systems of weighted voting, they tempered their opposition in order not to alienate their Western benefactors. This was most obvious in their attempts to establish SUNFED. Their use of the doctrine again failed to fulfill their aspirations for a capital development fund which would have combined low interest rates with administrative decision-making governed by equal voting and simple majority. The Western nations refused to consent to their being placed in a minority position and because of this opposition, the new nations compromised in order to remain as the recipients of Western aid. Appealing to the doctrine of state equality, the new nations were successful in the creation of UNCTAD. For the first time in history, an organization was dedicated

solely for the dual purpose of stimulating economic development among the developing nations and trade agreements designed to increase the developing nations' exports, export earnings, primary products and manufactured goods. Because of UNCTAD's need for financial support from the economically advanced nations of the world, however, the new nations' use of the doctrine for acquiring an administrative structure governed by equal voting and simple majorities proved unsuccessful.

Discussion was concentrated on the above areas; however, this does not preclude the investigation of equally valid areas which can also indicate the influence of the new nations and their appeal to the doctrine of state equality. Such areas include the International Court of Justice, the International Law Commission, and the Afro-Asian Legal Consultative Committee.

CHAPTER V

A SOCIOLOGICAL PERSPECTIVE OF THE NEW NATIONS AND THE DOCTRINE

The previous chapter indicated the results of the new nations' application of the doctrine of equality of states as a rationale behind their efforts in the United Nations system to acquire greater equality with the West. Yet, in order to evaluate effectively the contribution made by the new nations to the overall development of the doctrine, it is necessary to analyze their application of the doctrine in light of the three basic tenets of a sociological perspective of international law.

First, what relation exists, if any, between the new nations' application of the doctrine and their use of political reality? The answer to this question is provided largely by the following two general trends of activity, both of which, this chapter contends, were evident in the new nations' involvement in the United Nations system and were the result of their careful appraisal of political and economic realities: (1) They invoked the doctrine as a means to support their demands for equality when avenues were open for the realization of their demands, (2) They avoided pressing the doctrine as a rationale for their position to the point of alienating vital support from other nations.

The first trend was most obvious in the new

nations' efforts in the General Assembly and the Economic and Social Council. Since both U. N. organs were governed by the one nation-one vote system, the new nations knew that it was within reason to demand greater equality within the organ through increasing the membership of the Assembly's General Committee and ECOSOC's Committee on Non-Governmental Organizations. They were realistic enough to know that the Charter protected their demands and that they could utilize this protection to their own advantage. As Inis Claude said:

The vested interest of the small states in the egalitarian status quo is protected by two features of the amending process prescribed in Article 108 of the Charter. First, the requirement of unanimous ratification of amendments by the Big Five minimizes the likelihood of constitutional alteration, for the prospect of agreement among the great powers as to how differential voting weights should be allocated is very small, even though they might agree in principle on the need for institutionalizing inequality in the Assembly. Secondly, the provision that change can be accomplished only with the consent of two-thirds of the members of the United Nations, expressed ultimately in acts of ratification, puts the small states in a strong defensive position. The rigidities of the established pattern are in their favor.¹

Yet, the new nations were far too realistic to believe that even the Assembly's voting system destroyed the distinction between great and small states. They acknowledged the fact that formal voting power was significantly supplemented by informal capacity to affect

¹Claude, op. cit., pp. 126-127.

decisions.² They also knew, however, that the Assembly, because of its basic universality of membership and its system of voting, provided an avenue for political maneuvering between the two large blocs by which they could achieve a marginal and vicarious power that could supplement their vote and thereby decrease their political inferiority. Benjamin Akzin said:

At times, thanks to the device of blocs, they obtained tactical advantages entirely out of proportion with their general position in the scheme of things. The appearance of something resembling parliamentary groups has resulted in the attribution of a particular importance to the quantitative element in the make-up of international organizations.³

Political maneuvering was simply a pragmatic means to their objective, the enhancement of their political position vis-a-vis the large powers.⁴

At the same time, however, the new nations, for the most part, acknowledged the institutionalization of the veto in the Security Council and the pervading

²Claude, op. cit., p. 125.

³Akzin, op. cit., p. 156.

⁴It should be noted, however, that while political maneuvering was a realistic strategy of the new nations, it was, nevertheless, a position not without its dangers, for it:

creates in the international organization, in so far as secondary questions [important questions] are concerned, an apparent balance of forces, based on arithmetic, which bears very little resemblance to the actual forces in international life, thereby giving to international organization a somewhat unreal character. (Akzin, op. cit., p. 157.)

influence on the Big Five. Yet, rather than concentrate solely on the abolition of an inequality which they recognized would be present as long as the large powers were present, they took whatever measures they could to dispel the gap between themselves and the great powers. One realistic plan which later proved successful was the expansion of the non-permanent membership of the Council.

The second trend was most obvious in the new nations' efforts to create SUNFED and UNCTAD. In SUNFED, the new nations desired to achieve greater economic equality through low-interest loans. In UNCTAD, the new nations desired to achieve greater economic equality through trade agreements designed to increase their exports, export earnings, primary products, and manufactured goods. In both SUNFED and UNCTAD, however, the new nations desired governing boards where each member had only one vote and where decisions were made by simple majority. Also, in each case, the new nations recognized that the best means available to them for the achievement of their objectives was not by an adamant demand for sovereign equality which could alienate their Western benefactors. John Hadwen and Johann Kaufmann noted that during the innumerable debates on the question of the U. N. establishing SUNFED:

The less developed countries always had a U. N. majority in favor of the immediate establishment of a large-scale capital developemtn fund. However, the majority was never used irresponsibly. No final (underlined in original text) action was taken which did not carry with it the countries from which

the financial resources of any programme would have to come.⁵

Though again speaking of the new nations' fear of alienating financial support, yet going deeper into an analysis of the pragmatism exemplified by the new nations, Hadwen and Kaufmann said that the new nations hesitated in making a decision to establish SUNFED in the hope that funds would be made available because "if funds did not become available the idea of a large-scale U.N. capital aid fund would be dead once and for all. Delay from this point of view at least avoided a final negative decision."⁶ Richard Gardner, referring to UNCTAD, noted that while the new nations occasionally "passed resolutions over the opposition of a minority of industrial countries on matters affecting vital economic interests," they normally accommodated the desires of the industrial nations with the result that "in the closing days of UNCTAD there was an encouraging disposition on all sides to reach a consensus on some subjects."⁷

Thus, realism prevailed over the assertion of equality and rather than demanding the establishment of SUNFED regardless of Western opposition, the new nations compromised and settled for the creation of the Special

⁵Hadwen and Kaufmann, op. cit., p. 108.

⁶Hadwen and Kaufmann, op. cit., p. 108.

⁷Gardner, op. cit., p. 702.

Fund and rather than demanding equal voting and simple majorities within the framework of UNCATD, the new nations compromised and settled on creating a special committee designed "to establish a process of conciliation to take place before voting."⁸

In short, the new nations enhanced their own position when possible by invoking the doctrine and dropped the doctrine when it interfered with vital economic support. In both events, the doctrine was not confined to an appeal to unrealistic natural laws or to the will of the sovereign state. It was coupled with realism and, when expedient, even subordinated to realism.

Second, what effects did the new nations and their application of the doctrine have on the evolution of international relations? Again the answer is provided largely by two general trends of activity evident in the new nations' involvement in the United Nations system: (1) They invoked the doctrine as a rationale for their efforts in increasing the membership of the principle organs of the U.N., particularly the General Assembly, and in merging their superior numbers with the one nation-one vote system with the result that the rigid and even static bipolarity reflected in the Assembly began to accommodate the demands of this third force, (2) They invoked the doctrine as a means to support their demands

⁸United Nations, Proceedings, op. cit., p. 60.

for economic equality with the results that the former colonialist powers began to grow sensitive to the economic development of the former dependencies.

The first trend was most evident in the General Assembly, although the loosening of rigid bipolarity was not confined solely to the Assembly. The Assembly simply reflected to a large extent the changes occurring in the overall picture of international relations.⁹ Due to the preponderance of new nations in the General Assembly, the Assembly's method of voting, and the new nations' pragmatic strategy of political maneuvering, the bipolarization of the large powers which demanded uncritical acceptance of the policy of either the Soviet Union or the United States began to change to a more pluralistic though complex structure. The tendency of both the Communist and the Western blocs to align other nations into one of the orbits of power failed when the new nations, denying the preachments that the world was locked

⁹The reduction of bipolar rigidity as an evolutionary trend in the overall picture of international relations is beyond the scope of this chapter. For an analysis of this subject, however, see, for example: W. W. Kulski, International Politics in a Revolutionary Age (New York: J. B. Lippincott, 1964), pp. 279-310; Gustavo Lagos, International Stratification and Underdeveloped Countries (Chapel Hill: The University of North Carolina Press, 1962), p. 113; Hans J. Morgenthau, Politics Among Nations (3rd ed. rev.; New York: Alfred A. Knopf, 1965), pp. 346-364; John G. Stoessinger, The Might of Nations (2nd ed. rev.; New York: Random House, 1965), pp. 101-211.

in an apocalyptic life-and-death struggle and acting only to preserve their own national interests, weighted the issues and cast their all-important vote, regardless of blocs, for programs which would enhance their own status as equal partners in the family of nations. A vote for the United States did not necessarily mean a vote against the Soviet Union, but only a disagreement with the Soviet Union on a specific issue. This tendency was explained well by the Prime Minister of Tanganyika, Julius Nyerere, in a speech before the Tanganyikan National Assembly on June 1, 1961:

We give notice that no one will be able to count on an automatic vote from us simply because we are their friends. Nor should any country which feels unfriendly toward us assume that we shall automatically vote on the opposite side to it. We shall look at every issue in the light of whether we believe it supports the cause of freedom, of justice, and of peace in the world.¹⁰

The two major blocs realized that their voting power could increase only by identifying with the new nations. This desire for greater voting power and the attempts to equate their particular ideology with the aspirations of the "oppressed peoples of the world" resulted, according to Hans Morgenthau, in new tactical procedures. Traditionally, a large nations could bring

¹⁰Hans Kohn, The Age of Nationalism (New York: Harper and Brothers, 1962), pp. 146 and 153.

its superior power to bear upon the weaker nations, thereby establishing dependencies and forming alliances, although alliances were fashioned primarily by selecting states in view of the power they could add. After the heavy influx of new nations into the U.N., however, a powerful nation which tried to elicit support for its policies through the General Assembly could not rely on its size and power alone since they availed it nothing if they were unable to attract the votes necessary for a two-thirds majority. Thus, the most powerful nation had to heed the desires of the smallest state which had equal voting strength and had to present the issues to be decided in terms that would appeal to the small states. While the linguistic transformation may have done nothing more than present ideological justifications and rationalizations of national policies, the constant use of a particular terminology may well have influenced subtly the substance of the transactions themselves to the extent that it could have resulted "in the blunting of the sharp edges of a national policy, its retreat from an advanced position, and its reformulation...in the light of the supranational principles embodied in the language of the resolution."¹¹

The second trend was most evident in the U.N. agencies established to aid the new nations in their

¹¹Hans J. Morgenthau, Politics Among Nations (3rd ed. rev.; New York: Alfred A. Knopf, 1965), pp. 493-494.

economic development. Though the new nations failed to change the weighted voting system of the financial agencies, they were instrumental in creating the IDA which, contrary to the Bank's policy of "hard loans," charged no interest rates and uniformly granted a repayment period of fifty years. Although the new nations were unsuccessful in their attempts to establish SUNFED, they were successful in applying enough pressure to the economically advanced countries that the larger nations finally consented to a compromise which resulted in the establishment of the Special Fund. Although the new nations were unsuccessful in their attempts to guarantee for UNCTAD an administrative structure governed by a simple majority, they were successful in establishing UNCTAD "as an organ of the General Assembly to be convened at intervals of not more than three years..."¹² Thus, contrary to the seventeenth and eighteenth centuries when the doctrine was invoked only by European colonial powers with little regard for their dependencies, the doctrine in the mid-twentieth century was used by the new nations to demand Western assistance in the construction of an indigenous economy.

The new nations even were instrumental in giving a dynamic connotation to economic terminology used both in SUNFED and UNCTAD. As Gunnar Myrdal said:

¹²Prebisch, op. cit., p. 49.

The use of the concept "the underdeveloped countries" implies the value judgment that it is an accepted goal of public policy that the countries as designated should experience economic development. It is with this implication that people in the poorer countries use the term and press its usage upon people in the richer countries. When they, in their turn, accept this term and suppress the old one, "the backward countries," they also accept the implication. The change from the static to the dynamic concept thus implies in the richer countries and, therefore, an acknowledgment - given naturally, only in a general and therefore necessarily vague form - that those countries are right in demanding higher standards of income, a bigger share in the good things of life, and greater equality of opportunity.¹³

In short, the new nations used the doctrine to exert pressure on the status quo of international relations with the result that there was a reduction of bipolar rigidity and the creation of a more sensitive attitude by the large powers to the economic development of the young states. The doctrine when invoked by the new nations was no longer confined as it was by the naturalists and positivists, to European affairs.

Third, what effects did the new nations' application of the doctrine have on the integration of political realism and the formulation of ethics?¹⁴ Contrary to the naturalist tendency of wrapping the doctrine in moral absolutes unrelated to political realities and the positivist tendency of separating the doctrine from ethics through its emphasis on posited legal authority emanating from the will of the state,

¹³Gustave Lagos, International Stratification and Underdeveloped Countries (Chapel Hill: University of North Carolina Press, 1962), p. 113.

¹⁴This chapter also uses the term "morla" as another expression for the term "ethical."

the new nations coupled the doctrine with pragmatic means to obtain ethical objectives, considered earlier in the chapter though in different contexts. The ethical objectives were, first, the acquisition of a position in the U.N. where they could participate in international decision-making processes which formally were controlled primarily by the European nations and, more recently, by the bipolar powers and, second, the modernization and economic advancement of their countries.¹⁵ It is ironic that the doctrine, developed largely in the West where the highly sophisticated institutions and systems of ethics based on human integrity were held in great esteem, was invoked by the new nations to support their objectives. While the great powers accommodated the new nations largely from a desire to use the new nations' votes and support to increase their own position vis-a-vis their opposition, the new nations, on the other hand, capitalized on the new spirit of accommodation and

¹⁵It can be argued that the new nations' dual emphasis on one nation-one vote and majority rule is both unrealistic in the sense that "it does not reflect the greater portion of the world's real power" and ethically questionable in that majority decisions, in particular, "cannot be identified as expressions of the dominant will of a genuine community." (Claude, *op. cit.*, p. 119.) Rather than concentrate on this argument, this chapter intends only to draw a comparison between the naturalist and positivist positions and the position of the new nations. In relation to the argument, however, this chapter noted earlier in reference to UNCTAD that the new nations were realistic enough not to push majority rule to the point of hindering their overall objective, economic assistance from the West. The new nations realized that decisions made by a simple majority would not reflect the attitudes of their Western benefactors and, therefore, they, along with the developed nations, created a special committee which would establish a "process of conciliation to take place before voting..." (United Nations,

directed it toward their own advancement. This large power accommodation, regardless of its derivatives, was a marked change of policy from colonialist era. William L. Langer observed:

With reference to imperialism it is certainly true that there has been over the past century a marked alteration of mood, reflecting greater sensitivity to human suffering and a greater readiness to assume responsibility for the weak and helpless. In our day, anti-imperialism runs as strong in the West as did imperialism a couple of generations ago. Domination and exploitation of weaker peoples by the stronger, which seemed altogether natural in the past, is now felt to be incompatible with the principles of freedom, equality, and self-determination so generally accepted in modern societies.¹⁶

Perhaps the most important consideration is that the doctrine was invoked by the new nations to support their demands for equality when the demands were obtainable and was not pressed to the point of alienating vital support. The ethical objectives, supported by the doctrine, were placed in context with political realities with the result that the doctrine was subject neither to absolutism nor political naivete. The new nations verified Charles De Visscher's statement that "every renewed recognition of the foundations of power stimulates a renewal of values, every return to the realities holds promise of effectiveness."¹⁷

In short, the new nations, unlike the eighteenth and nineteenth century legal publicists, knew that their

Proceedings, op. cit., p. 60.)

¹⁶Williams L. Langer, "Farewell to Empire," Foreign Affairs Vol. 41 (October, 1962), pp. 129-130.

¹⁷Devisscher, op. cit., p. 365.

espousal of an ethic based on equality of states was an unsupported ideal unless it included pragmatically derived means for its realization.

The contention of this paper has been that by employing the doctrine of the equality of states in such a way that it was congruent with the basic tenets of a sociological perspective of international law, the new nations aided in the doctrine's development from myth to reality.. As far as the future of the doctrine is concerned, it could be that the doctrine as applied by the new nations was only the antithesis of the doctrine as interpreted and applied by the naturalists and positivists. Using the pattern of the Hegelian dialectic, this paper suggests simply as a matter of speculation that the doctrine in both cases, the doctrine as applied by the publicists of the past centuries and the doctrine as applied by the new nations, is still rigid to a large extent because it is used by nation states as a justification of their national sovereignty which tends to create smaller rather than larger political units. It is incongruent to the development of a universal supranational organization. Yet, the new nations broke the status quo governed by the Western colonial powers and now that all nations, Western and non-Western, are participants in the overall development of international law, particularly through the U.N. and its related agencies, perhaps there will be more common agreement as was generally expressed at UNCTAD that the only means by which to construct a more

integrated world community is through conciliation, rather than a majority vote. Perhaps then, provided it remains integrated with political realism, the doctrine will be given even greater universal overtones.

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Source: United Nations
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"The Principles of Sovereignty"

I. All States have the right
among others, to

a. That each State is a
sovereign State.

b. That each State is
equal in its
independence.

c. That each State is
equal in its
independence.

APPENDICES

I. The right of
self-determination.

II. The right of
self-determination.

Appendix A (1)

(Source: United Nations, General Assembly, Considerations of Principles of International Law Concerning Friendly Relations and Co-operation Among States: Proposal by Ghana, India, Mexico, and Yugoslavia (A/AC.119/L.28)).

"The Principle of Sovereign Equality of States"

- I. All States have the right to sovereign equality, which among others, includes the following elements:
 - A. That each State enjoys the rights inherent in full sovereignty.
 - B. That the personality of a state is inviolable as well as its territorial integrity and political independence.
 - C. The right to determine their political status, to choose their social, economic and cultural systems and pursue their development as they see fit and to conduct their internal and external policies without intervention by any other state; and
 - D. The right to the free disposal of their natural wealth and resources.
- II. Correspondingly, every State has the duty to discharge faithfully its international obligations especially to live in peace with other States.

Appendix A (2)

(Source: United Nations, General Assembly, Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States: Proposal by Czechoslovakia (A/AC.119/L.6, November 16, 1964).)

"The Principle of Sovereign Equality of States"

1. States are sovereign and as such are equal among themselves, as subjects of international law they have equal rights and duties, and reasons of a political, social, economic, geographic or other nature cannot restrict the capacity of a State to act or assume obligations as an equal member of the international community.
2. Each State shall respect the supreme authority of each other State over the territory, including territorial waters and air space of the latter State, and shall also respect its independence in international relations.
3. Each State shall have the right to take part in the solution of international questions affecting its legitimate interests, including the right to join international organizations and to become party to multilateral treaties dealing with or governing matters involving such interests.

Appendix A (3)

(Source: United Nations, General Assembly, Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States (A/5746, November 16, 1964).)

"Decision of the Special Committee on the Recommendations of the Drafting Committee"

On the recommendation of the Drafting Committee, the Special Committee at its 39th meeting, adopted unanimously the following text:

Points of consensus

1. All States enjoy sovereign equality. As subjects of international law, they have equal rights and duties.
2. In particular, sovereign equality includes the following elements:
 - a. States are juridically equal.
 - b. Each State enjoys the rights inherent in full sovereignty.
 - c. Each State has the duty to respect the personality of other States.
 - d. The territorial integrity and political independence of the State are inviolable.
 - e. Each State has the rights freely to choose and develop its political, social, economic and cultural system.
 - f. Each State has the duty to comply fully and in good faith with its international obligations, and to live in peace with other States.

Source: Principles of International Law
1964. For a
United Nations, 39th
Session (1964).

Appendix B
Newly Independent Nations

<u>1923</u>	<u>1956</u>	<u>1962</u>
Nepal	Morocco	Algeria
	Sudan	Burundi
<u>1943</u>	<u>1957</u>	Jamaica
Lebanon	Tunisia	Rwanda
		Trinidad & Tobago
<u>1944</u>	<u>1958</u>	Uganda
Iceland	Ghana	Western Samoa
Syria	Guinea	
<u>1946</u>	United Arab Republic	<u>1963</u>
Jordan		Kenya
Philippines		Malaysia
	<u>1960</u>	*Zanzibar
<u>1947</u>	Cameroon	
India	Central African Republic	<u>1964</u>
Pakistan	Chad	Malawi
Yemen	Congo (Brazzaville)	Malta
	Congo (Leopoldville)	*Tanzania
	Cyprus	Zambia
<u>1948</u>	Dahomey	
Burma	Sabon	<u>1965</u>
Ceylon	Ivory Coast	Maldiv Islands
Israel	Malagasy Republic	Singapore
Korea	Mali	The Gambia
	Mauritania	
<u>1949</u>	Niger	<u>1966</u>
Cambodia	Nigeria	Barbados
Indonesia	Senegal	Basutoland
Laos	Somali Republic	Botswana
Vietnam	Togo	Swaziland
	Upper Volta	
<u>1951</u>		
Libya	<u>1961</u>	
	Kuwait	
	Sierra Leone	
	*Tanganyika	

*Tanzania was formed by the merger of Tanganyika and Zambia in April, 1964.

Source: William V. O'Brien (ed.), The New Nations in International Law and Diplomacy (New York: Frederick A. Praeger, 1965). For nations independent since 1966, see: United Nations, Delegations to the United Nations, Twenty-first Session (ST/SG/SER.B/17), (New York, 1966).

Appendix C

United Nations Membership, 1945-66

	Western Europe	Eastern Europe	Asia and Africa	Oceania	The Americas	Total
	9	6	12	2	22	51
Founder members:						
Admissions during						
1946	2	-	2	-	-	4
1947	-	-	2	-	-	2
1948	-	-	1	-	-	1
1949	-	-	1	-	-	1
1950	-	-	1	-	-	1
1951	-	-	-	-	-	-
1952	-	-	-	-	-	-
1953	-	-	-	-	-	-
1954	-	-	-	-	-	-
1955	6	4	6	-	-	16
1956	-	-	4	-	-	4
1957	-	-	2	-	-	2
1958	-	-	1	-	-	1
1959	-	-	-	-	-	-
1960	-	-	17	-	-	17
1961	-	-	4	-	-	4
1962	-	-	4	-	-	4
1963	-	-	2	-	2	6
1964	-	-	3	-	-	2
1965	-	-	2	1	-	3
1966	-	-	3	-	1	4
Total	17	10	67	3	25	122

Sources: Sydney D. Bailey, The United Nations: A Short Political Guide (New York: Frederick A. Praeger, 1963), p. 13. For United Nations membership since 1966, see: United Nations, Delegations to the United Nations, Twenty-first Session (S7/S6/SER. B/17), (New York, 1966).